TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 165

BLAMBERG BROTHERS, APPELLANT,

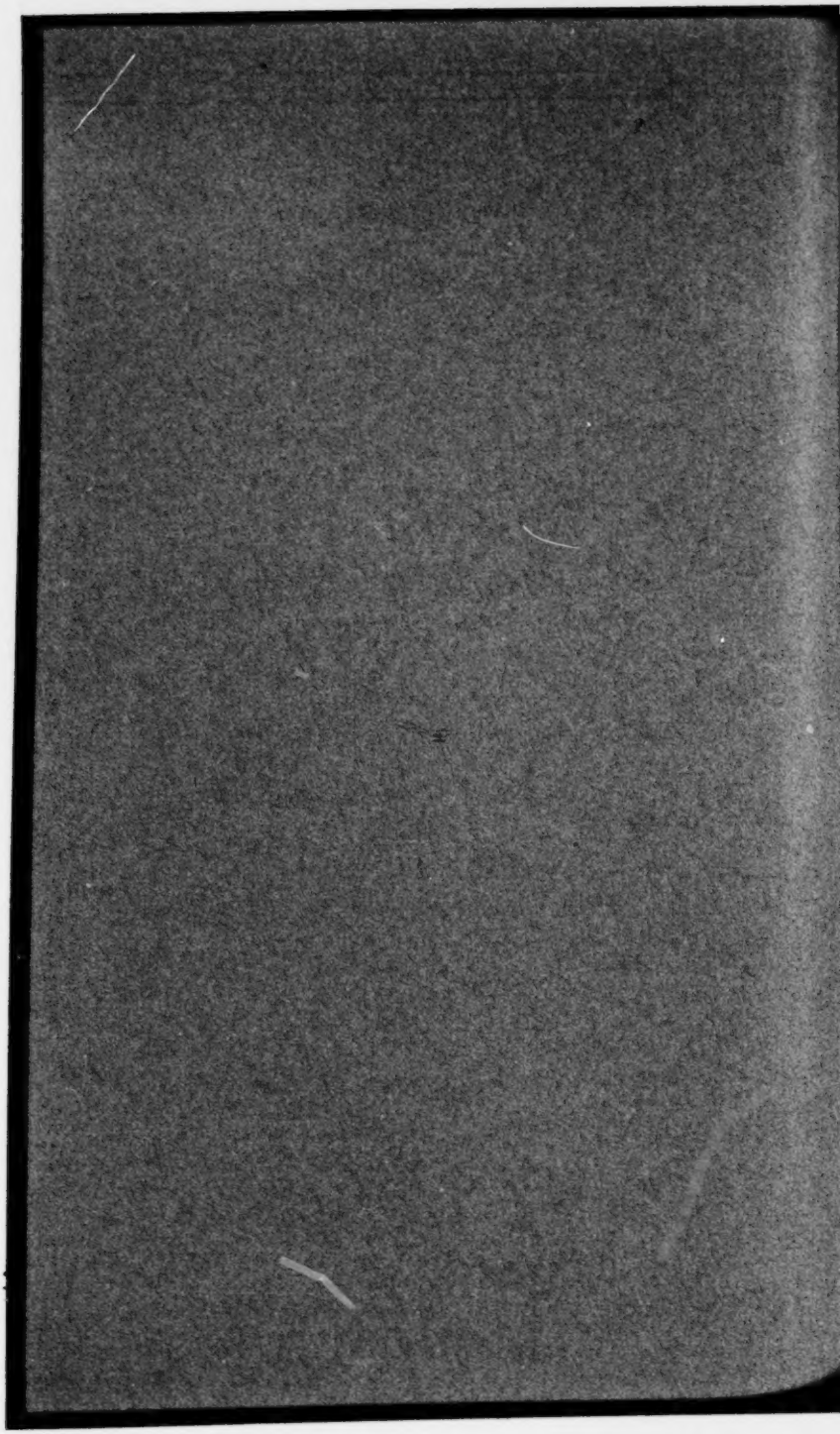
vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED SEPTEMBER 5, 1923.

(26,467)



(28,467)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 512.

BLAMBERG BROTHERS, APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 19, 1921.

1 TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
District of Maryland, To-wit:

At a District Court of the United States for the District of Maryland Begun and Held in the City of Baltimore on the First Tuesday in March (Being the First Day of the Same Month), in the Year of Our Lord One Thousand Nine Hundred and Twenty-one.

Present: The Honorable John C. Rose, Judge Maryland District; Robert R. Carman, Esq., Attorney; William W. Stockham, Esq., Marshal; Arthur L. Spamer, Clerk.

Among other were the following proceedings, to wit:

No. 797. Admiralty.

BLAMBERG BROTHERS, a Body Corporate,

versus

UNITED STATES OF AMERICA.

2 *Libel.*

Filed 26th February, 1921.

To the Honorable the Judge of the United States District Court for the District of Maryland:

The libel and complaint of Blamberg Brothers, a body corporate, against United States of America in a cause of contract and cargo damage, civil and maritime, alleges and respectfully shows to this Honorable Court, as follows:

First. Your Libellant is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, having its principal office and place business at No. 107 Commerce Street, Baltimore, Maryland, and is engaged in the business of exporting and importing flour, corn, grain and other commodities.

Second. At all times hereinafter mentioned, the respondent above mentioned, was, and now is the owner and/or operator of the schooner barge "Catskill," of the registered tonnage of approximately 2,300 tons, which at all the said times was employed as a merchant vessel in the common carriage of merchandise for hire, between, among others, the ports of New York and Baltimore, United States of America, and the port of Havana, Cuba.

Third. That said barge "Catskill" is now, or will be, during the pendency of process hereunder, within this District and within the jurisdiction of this Honorable Court.

Fourth. That on or about the sixth day of October, Nineteen Hundred and Twenty, the Libellant shipped and placed
3 aboard the said vessel, then lying in the Port of Baltimore, Maryland, 1,500 bags of corn in good order and condition, to be carried by the said "Catskill" to the port of Havana, Cuba, and there to be delivered in like good order and condition, as when shipped to the order of your Libellant notify Demetrio Mederos and Felipe Amaral, in consideration of certain agreed freight, then and there paid by said Libellant, and in accordance with the valid terms of certain Bills of Lading, then and there signed and delivered to the Libellant shipper, by the duly authorized Agent of the barge "Catskill" and of your Respondent.

Fifth. Thereafter, the said barge "Catskill," having on board said merchandise, sailed from the said port of Baltimore, and subsequently, to wit, during the month of November, Nineteen Hundred and Twenty, arrived at the port of Havana, Cuba, but notwithstanding all of the aforesaid, the said barge "Catskill," has never made delivery of said shipment, tho it was possible so to do, and in addition thereto the property of your Libellant, as aforesaid, by reason of such delay, and failure to deliver, has greatly deteriorated, and is not in like good order and condition as when shipped, being, on the other hand, short, slack and otherwise seriously injured and damaged, which has caused this Libellant great injury and damage.

Sixth. As has been averred, your Libellant is the owner of the aforesaid merchandise and the holder for value of the aforesaid Bills of Lading, and of all the rights thereunder, and are entitled to have delivery of the aforesaid merchandise, made in accordance with the terms and conditions of said Bills of Lading.

Seventh. By reason of the premises, your Libellant has sustained damages in the sum of Fifteen Thousand ($15,000) Dollars, as nearly as the same can now be estimated, no part of which has
4 been paid, although the same has been demanded.

Eighth. All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your Libellant prays that on the filing with this Honorable Court of a sworn return of the service of copies of this Libel on the United States Attorney for the District of Maryland, and on the Attorney General of the United States, as provided for in the United States Public Act No. 156—66th Congress, the said Respondent be required to appear and answer all and singular the matters aforesaid, according to the principles of law and the rules of practice obtaining in like cases between private parties, and that this Honorable Court be pleased to decree to your Libellant its damages

with interest and costs, and that your Libellant may have such other and further relief as in law and justice it may be entitled to receive.

JOSEPH TOWNSEND ENGLAND,
J. EDWARD TYLER,
Proctors for Libellant.

STATE OF MARYLAND,
City of Baltimore, To-wit:

R. Lee Blamberg, being duly sworn, deposes and says, that he is the Vice-President of Blamberg Brothers, Libellant herein, and that he has read the foregoing Libel and complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

That the reason this verification is made by dependent and not by Libellant, is that Libellant is a corporation, but deponent is duly authorized to make this affidavit.

Sworn to before me this 25 day of February, 1921.

[Notary's Seal.] JULIA BRADLEY,
Notary Public.

STATE OF MARYLAND,
City of Baltimore, To-wit:

Joseph Townsend England, being duly sworn, deposes and states that he is the Proctor in the matter of Blamberg Brothers, a body corporate, against the United States of America, and furthermore, that he has duly served a copy of said libel on the United States District Attorney for the District of Maryland, and that he mailed a copy by registered mail to the Attorney General of the United States, this sworn return being made in accordance with the provisions of the Public Law No. 156—66th Congress, Section 3076, and of all laws of the United States of America applicable thereto.

JOSEPH TOWNSEND ENGLAND,
Proctor.

Subscribed and sworn to before me this 25 day of February, 1921.

[Notary's Seal.] JULIA BRADLEY,
Notary Public.

6 *Answer of Respondent.*

Filed 22nd April, 1921.

In the District Court of the United States for the District of Maryland.

BLAMBERG BROTHERS, a Body Corporate,

against

UNITED STATES OF AMERICA.

To the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland:

The answer of the respondent, the United States of America, to the libel herein against it exhibited in a cause of contract and cargo damage, civil and maritime, alleges as follows:

First. Answering the first paragraph of said libel, your respondent, alleges that it has no knowledge of its own with respect to the matters and facts therein contained, but believes them to be true.

Second. Answering the second paragraph of said libel, your respondent admits it is the qualified owner of the said barge Catskill as hereinafter will more fully appear, but denies that it is or has ever been in charge of the operation of the said barge. Your respondent admits the registered tonnage of the vessel as alleged and while it has no knowledge of its own, believes that same was employed as a merchant vessel as therein alleged.

Third. Answering the third paragraph of the libel, your respondent is advised that said barge Catskill is presently at Havana, Cuba, and has no knowledge of its own as to when the said barge is expected to arrive in this jurisdiction.

7 Fourth. Answering the fourth paragraph of the libel, your respondent alleges that it has no knowledge of the facts therein alleged and demands strict proof thereof.

Fifth. Answering the fifth paragraph of the libel, your respondent alleges that it has no knowledge of the facts therein alleged and demands strict proof thereof.

Sixth. Answering the sixth paragraph of the libel, your respondent alleges that it has no knowledge of the facts therein alleged, and requires strict proof thereof.

Seventh. Answering the seventh paragraph of the libel, your respondent alleges that it has no knowledge of the facts therein alleged, and demands strict proof thereof.

Eighth. Answering the eighth paragraph of the libel, your respondent admits the admiralty and maritime jurisdiction of this Honorable Court.

And further answering said libel, your respondent alleges as follows:

(1) That on the twenty-sixth day of July, 1920, your respondent, represented by the United States Shipping Board and by the United States Shipping Board Emergency Fleet Corporation, entered into a contract for the sale of the barge Catskill with the Guidera Towing and Transportation Company, a corporation of the State of New York, with its principal office in New York City, in said State.

(2) That by the terms of the said agreement, your re-pondent agreed to sell the said barge Catskill, to the said Guidera Towing and Transportation Company, at and for the sum of sixty thousand dollars, six thousand dollars of which was to be paid on the date of the execution of the contract aforesaid, the balance thereof, to be paid in equal monthly installments of three thousand dollars, all of which will more fully appear from copy of the said contract
8 or agreement filed herewith and prayed to be taken as a part hereof, as fully as if set out at length herein.

(3) That the said Guidera Towing and Transportation Company has paid your respondent the sum of six thousand dollars but has defaulted in the payment of each and every installment due and owing your respondent under said contract or agreement.

(4) That the said Barge Catskill was delivered to the Guidera Towing and Transportation Company on or about the thirtieth day of June, 1920, and before her construction was complete, and since which time your respondent has neither directly nor indirectly assumed any control over her management or operation.

(5) That the contract of affreightment set forth in the libel was not made by the libellants with your respondent or with anyone duly authorized by your respondent to enter into such a contract or agreement; and to the contrary, your respondent alleges that the said barge was under complete control and custody of and was being managed and operated by the said Guidera Towing and Transportation Company and that any contract of affreightment entered into by the libellant as alleged was made and entered into by it or on its behalf with the said Guidera Towing and Transportation Company, or by some person, firm or coporation representing the said Guidera Towing and Transportation Company; your respondent has no knowledge concerning the making of the said contract, or the circumstances and conditions under which the same was made, nor has it any knowledge with respect to the loading, transportation, or discharge of the cargo, as alleged in the libel.

Wherefore, having fully answered said libel, your respondent prays that same be dismissed with costs.

Respectfully submitted,

ROBT. R. CARMAN,
United States Attorney,
Proctor for Respondent.

9 UNITED STATES OF AMERICA,
District of Maryland, To wit:

Now comes Robert R. Carman, United States Attorney, for the District of Maryland, who, being duly sworn according to law, deposes and says that the facts set forth in the foregoing answer are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me, this 21st day of April, 1921.

CHAS. W. ZIMMERMANN,
Chief Deputy Clerk U. S. District
Court for District of Maryland.

10 *Copy of Agreement Filed with Answer.*

This agreement made this 26th day of July, Nineteen Hundred and Twenty, by and between United States of America, represented by United States Shipping Board and by United States Shipping Board Emergency Fleet Corporation, a corporation organized and existing under the laws of the District of Columbia, party of the first part (hereinafter called the Seller), and the Guidera Towing and Transportation Company, of New York City, State of New York, a corporation organized and existing under the laws of the State of ——, party of the second part (hereinafter called the Buyer);

Witnesseth:

1. The Seller hereby agrees to sell and the Buyer hereby agrees to take and pay for Two (2) Converted Ferris Type Uncompleted Wood Hulls now lying and situated in the storage yards along the Atlantic Coast of the United States.

2. The Buyer agrees to pay for said wood hulls the total sum of One Hundred Twenty Thousand ($120,000.00) Dollars, apportioned as follows:

For Ferris Hull number Two Hundred Seventy-three (273), named "Catskill," located and lying at Wilson Point, South Norwalk, in State of Connecticut, Sixty Thousand ($60,000.00) dollars.

For Ferris Hull number Two Thousand Ninety-Nine (2099), named "Fort Pierce," located and lying at Hog Island, State of Pennsylvania,—Sixty Thousand ($60,000.00) Dollars.

3. It is agreed and understood that the Buyer shall take and accept said hulls where they are and as they are in condition found, and that said hulls are to be sold on a bare hull basis, and that this term shall be held to mean as follows:

The constructive features of the hulls as now standing including the following equipment if on board, installed or otherwise:

11 Masts and Booms; Bitts and Chocks;
Standing Rigging (Shrouds),
Hawse Pipes,
Rudder,
Hand Steering Gear.

All other equipment on board shall be held and recognized as the property of the Seller but may be purchased by the Buyer at the appraisal value, and if not so purchased, may be removed by the Seller; and it is agreed that if the Seller does not remove said other equipment within sixty (60) days from the date of this agreement, said other material and equipment being on board said hulls shall pass with said hulls and become the property of the Buyer; and it is expressly agreed and understood that said Masts and Booms, Bitts and Chocks, Standing Rigging (Shrouds), Hawse Pipes, Rudder, and Hand Steering Gears, shall not pass to the Buyer or become his property unless the same shall be on board said hulls at the time of the execution of this contract, but the same may be purchased at appraised prices by the Buyer as other equipment, as herein provided to be purchased.

4. It is agreed that concurrently with the signing of this contract the Buyer shall pay to the Seller the sum of Twelve Thousand ($12,000.00) Dollars in part payment of said hulls. The balance of said purchase price, to wit, the sum of One Hundred Eight Thousand ($108,000.00) Dollars shall be paid as follows:

Five (5%) per cent of said purchase price, the same being Six Thousand ($6,000.00) Dollars, shall be paid on the first day of each month subsequent to signing of this contract, beginning six (6) months from the date hereof, until all the said amount has been paid, together with interest thereon; and it is further agreed that interest shall be paid by the Buyer upon deferred payments at the rate of Five (5%) per cent per annum, payable semi-annually. It is further understood and agreed that the certain equipment which does not pass with the hulls and which may be purchased by the Buyer hereunder at appraisal prices shall be paid for as follows:

12 The first payment of Fifteen (15%) per cent. thereof shall be made by the Buyer Six (6) months after the execution of this contract, and the remainder thereof shall be paid at the rate of Five (5%) per cent. thereof each month thereafter. Interest shall be paid by the Buyer on all deferred payments at the rate of Five (5%) per cent. per annum, payable semi-annually. All payments to be made by the Buyer hereunder shall be made at the office of the Seller in the City of Washington, District of Columbia. All deferred payments shall be evidenced by promissory notes of the Buyer payable to the Seller. The Seller hereby acknowledges receipt of Three Thousand Eight Hundred ($3,800.00) Dollars paid by the Buyer to be applied upon and be a part of the first cash payment of Twelve Thousand ($12,000.00) Dollars.

5. The Buyer hereby agrees to complete the said hulls, and it is further agreed and understood that the title to the said hulls and/or equipment therefor and any additions or improvements made thereto shall be and remain in the Seller until all of the sums of money agreed to be paid by the Buyer shall have been paid.

It is further agreed that from the time of delivery of said hulls to the Buyer and up to the time the same shall be documented, the Buyer agrees to keep said hulls free from all liens and encumbrances and to keep the same insured against fire and/ or builder's risks at the full value thereof, all policies to be payable to the United States Shipping Board for the Seller and the Buyer as their representative interests may appear, and the binders or policies are to be delivered to the said United States Shipping Board.

Upon the documentation of each of said hulls, the Buyer agrees to insure the same at the full value thereof under the American Hull Underwriters' Association form of policy, and said policy is to be payable to the United States Shipping Board for the Seller
13 and/or the Buyer as their interests may appear, and the binders or policies are to be delivered to the United States Shipping Board.

6. Upon the payment of all sums or amounts due or which become due hereunder, the Seller will execute and deliver to the Buyer a good and sufficient bill of sale for each of said hulls, and to transfer and pass to the Buyer all the right title and interest of the Seller in and to said hulls.

This Agreement shall be executed interchangeably in triplicate; Parts one (1) and Three (3) shall be delivered to the Seller, and Part Two (2) to the Buyer.

In witness whereof, the parties hereto have caused this instrument to be signed by their respective officers thereunto duly authorized, and their respective Corporate Seals to be hereto affixed, duly attested, on the day and year first above written.

UNITED STATES OF AMERICA,
By UNITED STATES SHIPPING BOARD,
By W. S. BENSON.
W. S. BENSON,
J. LUDLEY. *Chairman.*

Attest:
EDW. J. FLAHERTY, *Secretary.*

By UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION,
By W. S. BENSON.
W. S. BENSON, *Chairman.*

Attest:
EDW. J. FLAHERTY,
Secretary.

GUIDERA TOWING AND TRANSPORTATION COMPANY,
By THOMAS F. GUIDERA, *Pres.*

Attest:

EDWARD F. PAITSER.

Approved as to form.

JOHN C. CARMICHAEL,
JOHN C. CARMICHAEL,
Assistant Counsel.

6/24/20.

14 DISTRICT OF COLUMBIA, *ss:*

I, J. Parson James, a Notary Public in and for the District of Columbia, do hereby certify that W. S. Benson, who is President of the United States Shipping Board Emergency Fleet Corporation, which said Fleet Corporation, for and on behalf of the United States of America, executed a certain agreement bearing date on the 26th day of July, 1920, hereto annexed, personally appeared before me in said District of Columbia, the said being personally well known to me as the President of said Fleet Corporation which executed for and on behalf of the said United States of America the said agreement, and acknowledged to me that he executed the same as President of said Fleet Corporation, and that the same is the free and voluntary act and deed of said United States of America, through the said United States Shipping Board Emergency Fleet Corporation, and of himself as such President, for the uses and purposes therein expressed.

Given under my hand and seal this 26th day of July, 1920.

J. PARSON JAMES,
Notary Public.

My commission expires June 21, 1925.

STATE OF N. Y.,
County of N. Y., ss:

On the 26th day of June, nineteen hundred and twenty, before me came Thomas F. Guidera, to me known, who being by me duly sworn, did depose and say that he resides in Westbury, N. Y.; that he is the President of The Guidera Towing and Transportation Co., Inc. the Corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

WILLIAM B. CAVEL,
Notary Public.

My commission expires 1921.
Notary Public Rockland County.
Certificate filed in New York County No. 243.
Register No. 1362.

15 *Suggestion of Respondent of Want of Jurisdiction.*

Filed 3rd May, 1921.

In the District Court of the United States for the District of Maryland.

In Admiralty.

BLAMBERG BROTHERS, a Body Corporate,

against

UNITED STATES OF AMERICA.

To the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland:

Leave of court having been first had and obtained, your respondent suggests that this Honorable Court is without jurisdiction to determine the issues herein involved and for cause alleges as follows:

First. That on the twenty sixth day of July, 1920, your respondent represented by the United States Shipping Board, and by the United States Shipping Board Emergency Fleet Corporation, entered into a contract of sale with the Guidera Towing and Transportation Company (hereinafter called Towing Company), a corporation of the State of New York, with its principal office in New York City, in said State, for the sale to the said Towing Company by the respondent of the barge Catskill.

Second. That by the terms of the said agreement your respondent agreed to sell said barge Catskill to the said Towing Company at and for the price of sixty thousand dollars of which said purchase price, six thousand dollars was to be paid to your respondent on the day of the execution of the contract of sale aforesaid; by the terms of said agreement the balance of said purchase price was to be paid in equal monthly installments of three thousand dollars, beginning six months from the date of the said contract of sale, all of which will more fully appear from a copy of the said sales contract or agreement heretofore filed in these proceedings by your respondent. Your respondent prays that said sales contract or agreement be taken and made a part hereof fully and to the same extent as if incor-

16 porated herein at length.

Third. That the said Towing Company has paid to your respondent on account of the said contract or purchase price the sum of six thousand dollars and has defaulted in the payment of each and every deferred installment due and payable thereunder. That said barge Catskill was delivered by your respondent to the said Towing Company on July 26th, 1920, since which date possession of the said barge Catskill, her management and operation have been exclusively in the custody and control of the said Towing Company, her agents

and servants, without the custody, control or interference whatsoever by or on the part of your respondent, or anyone duly authorized to represent your respondent.

4. That the contract of affreightment alleged to have been breached in the libel herein filed was made subsequent to the delivery of said barge by your respondent to the Towing Company and while the said barge was in the possession of and was being operated, managed and controlled by the said Towing Company, its agents and servants without the exercise of any management or control whatsoever on the part of your respondent; that your respondent had no interest whatsoever in the pending freight arising out of said contract of affreightment; that the bills of lading issued to and accepted by the libellant arising out of said contract of affreightment, were issued by and in the name of the said Towing Company.

Fifth. That the said barge is now at the port of Havana, Cuba, without the jurisdiction of this Honorable Court and has been libeled in the sum of $3,725 for wage claims, and in addition to said libel filed as aforesaid, there have been additional libels filed against your respondent in the United States District Court for the Southern District of New York, in the United States District Court for the Western District of Pennsylvania, and in the United States District Court for the Middle District of Pennsylvania, said claims aggregating
17 an amount in excess of the value of said barge which said value your respondent alleges to be not in excess of fifty thousand dollars.

Sixth. Your respondent further alleges and suggests to this Honorable Court that the libel herein filed, has been filed against your respondent in personam, and your respondent is advised that because of the facts hereinbefore alleged your respondent cannot be proceeded against in an action in personam; that inasmuch as the libel herein filed against your respondent is designed to establish a personal liability against your respondent, that it is entitled to have the libel dismissed. Your respondent is further advised and alleges that it cannot be proceeded against in this Honorable Court by a libel in the nature of in rem proceedings, as provided for by the Act of March 9, 1920, for the reason that at the time of the filing of the libel herein, and at all times since, the said barge Catskill was and has been at the port of Havana, Cuba, and without the jurisdiction of this Honorable Court.

Wherefore, your respondent prays that the said libel be dismissed with costs.

ROBERT R. CARMAN,
United States Attorney.

UNITED STATES OF AMERICA,
District of Maryland, To wit:

Now comes Robert R. Carman, United States Attorney for the District of Maryland, who, being duly sworn according to law, deposes

and says that the facts set forth in the foregoing suggestion are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me, this 3rd day of May, 1921.

ARTHUR L. SPAMER,
Clerk U. S. District Court for District of Maryland.

18 *Memorandum of Libellant in Reply to Respondent's Suggestion of Want of Jurisdiction.*

Filed 5th May, 1921.

United States District Court for the District of Maryland.

In Admiralty.

BLAMBERG BROTHERS, a Body Corporate, Libellant,

against

UNITED STATES OF AMERICA, Respondent.

Memorandum of the Libellant in Reply to the Suggestion Filed by the Respondent.

To the Honorable John C. Rose, District Judge of the United States for the District of Maryland:

The libellant, in reply to the respondent's suggestion herein that this Honorable Court is without jurisdiction to determine the issues herein (this memorandum being conceived as in the nature of an answer to exceptions), alleges as follows:

First. Answering the First paragraph, your libellant, for the purpose of the argument on the issues raised by said suggestion, admits the facts alleged therein.

19 Second. Answering the Second paragraph, your libellant, for the purpose of the argument on the issues raised by said suggestion, admits the facts alleged therein.

Third. Answering the Third paragraph, your libellant, for the purpose of the argument on the issues raised by said suggestion, admits the facts alleged therein.

Fourth. Answering the Fourth paragraph, your libellant, for the purpose of the argument on the issues raised by said suggestion, admits the facts alleged therein.

Fifth. Answering the Fifth paragraph of said Suggestion, your libellant admits the allegations contained therein, except as to the value of the said barge "Catskill," and as to said allegation as to value, your libellant has no knowledge or information sufficient to form a belief. Further answering said Fifth paragraph, your libellant submits that the facts therein alleged are immaterial to the issue of jurisdiction raised by the Suggestion of the respondent herein.

Sixth. Answering Paragraph Sixth of said Suggestion, your libellant admits that the libel filed herein is against the respondent in personam. Your libellant admits that, under the facts admitted herein, no direct personal liability, as personal liability is commonly understood in Admiralty suits in personam, can be established against the respondent. Your libellant is proceeding by a libel in personam against the respondent, as owner of the said barge "Catskill," to establish a liability of the said barge "Catskill," as provided for in the Act of Congress, approved March 9, 1920, commonly known as "The Suits in Admiralty Act"—the right to bring said libel in personam being created by said Act as a substitute for the ordinary libel in rem. Your libellant denies that the jurisdiction of this Court over the matters alleged in the libel, is dependent on finding said barge "Catskill" within the jurisdiction of this
20 Honorable Court, but on the contrary, your libellant alleges that the facts alleged in Paragraph First of the libel are sufficient, in view of the provisions of the said Act of Congress, approved March 9, 1920, to establish the jurisdiction of this Honorable Court.

Wherefore, the libellant prays that the prayer of the respondent in said suggestion contained, that the libel herein be dismissed with costs, be denied.

TYLER AND ENGLAND,
HARRINGTON, BINGHAM AND ENGLAR,
Proctors for Libellant.

Office & P. O. Address: Number 64 Wall Street, Borough of Manhattan, City of New York.

HAROLD T. AMBERG,
Of Counsel.

21 *Opinion of the Court.*

Filed 31st May, 1921.

In the District Court of the United States for the District of Maryland.

No. 797. Admiralty.

BLAMBERG BROTHERS, a Body Corporate.

vs.

THE UNITED STATES OF AMERICA.

ROSE, *District Judge:*

On July 26th last, the United States agreed to sell its schooner barge, the Catskill, to the Guidera Towing and Transportation Company, hereinafter called the Towing Company, for sixty thousand dollars—six thousand dollars down, and fifty-four thousand in eigh-

teen equal monthly installments, the first of which was not payable until the succeeding January. The purchaser went into immediate possession, although the vendor retained title until the balance of the purchase price was paid.

In October, the Towing Company entered into contracts of affreightment with the libellants and many others, under which it received on board the barge at Baltimore, goods to be carried to Havana and there delivered. When in November, the vessel reached its destination, it found commercial conditions there greatly disturbed. The inability of the Towing Company to meet its engagements became manifest. The cargo was not delivered to the consignee, and six months later, was still on board. This libel has been filed to recover against the government, the Liability in rem of the barge for the non-delivery of libellants's goods.

The respondent says that this Court is without jurisdiction. It is not questioned that under the Act of March 9, 1920, (41 Stat. 525) the libellants may, in a proceeding in personam, recover in the proper district for any liability which in the Courts of the United States might have been enforced against the barge in rem, had she been privately owned, but it is said that as the vessel was at the time the libel was filed, outside of this country, and has ever since remained in foreign waters, it would not have been subject to the processes of our Courts had it belonged to an individual and that it follows that no liability may now be asserted in them against the Government.

22 The principal purpose of the statute under which the proceedings was brought, was to prevent within the United States, the arrest upon judicial process of any government owned ship or cargo, without thereby working injustice or hardship to those who as against either, had valid claims which if the vessel or the merchandise had belonged to private persons, they might have asserted in rem, but there is in it, and in its legislative history, cause to believe that it may also have intended to give the consent of the United States to being made a respondent in suits in personam upon some classes of maritime liabilities in which individuals would have been liable in personam, but upon which proceedings in rem could not have been maintained.

The first section of the statute forbids the arrest or seizure of a government owned ship or cargo. The second provides that a libel in personam may be brought against the United States when, if the vessel or merchandise mentioned in the first section had been privately owned, a proceeding in admiralty could be maintained at the time the suit was commenced, provided the ship in question was employed as a merchant vessel.

Then follows the venue provision, upon the proper construction of which the parties are at issue. It reads:

"Such suits shall be brought in the District Court of the United States for the District in which the parties or some of them reside or have their principal place of business in the United States, or in which the vessel or cargo, charged with liability is found."

It is further provided that upon the application of either party, the cause may, at the discretion of the court, be transferred to any other District Court of the United States.

The libellants live in this District, and they say that the quoted language is express authority for the institution of the suit in this Court. In their view the libel may be properly filed in (1) the District in which any of the libellants live or (2) in which they have their principal place of business or (3) in which the vessel charged with liability is found. They argue that Congress knew that it was giving a somewhat extended choice of venue and guarded against the possibility of resulting inconvenience by the transfer pro-
23 vision.

The government replies that so to hold is to misinterpret the purpose of the provisions as to venue. In its view the libel must be filed in the District in which the offending res is, whenever the cause of action is one in which the liability would be in rem only if the ship or cargo were privately owned. Permission to sue wherever libellant lives or has its principal place of business is in its view, given only in those cases in which the proceeding is one which in its origin, is essentially in personam. It was intended as a limitation rather than an extension upon the number of districts in which the suit might be brought. Where the United States is liable in personam, and consents to be sued generally, proceedings might properly be instituted in any one of some four score districts for the government can be found in everyone of them. No such wide range of choice is necessary for the protection of persons aggrieved, and in practice it might if permitted, lead to abuse and would, upon occasion, cause much inconvenience. The libellants could not complain if they were allowed to sue where they lived or had their principal place of business. The libellants at bar not only challenge directly this construction of the venue provisions, but assert that there is nothing in the act to show that Congress had in mind any distinction as to venue between causes of action which as against individuals or individually owned ships or cargo, would have been in personam or in rem, and that on the contrary, its primary purpose was to ensure that as against the United States, they should always be in personam, reserving to the libellant, the right under some circumstances important, to claim if he could, that his substantive rights should be those he would have had in a proceeding in rem. They argue that it is by no means clear that Congress has consented that the United States shall be sueable in personam at all, unless a liability in rem would have existed except for the statute. They point out that if such permission is not given, and if the government's construction of the venue provision is accepted, there will be no circumstances in which the right to sue in the District of libellant's resident or principal place of business, can be exercised.

24 The learned advocates for the government do not themselves contend that the United States has agreed to be sued in personam in admiralty in all cases in which an individual might be, but they say it has, in that large number of instances in which liability depends upon its relationship as owner or operator of a

particular ship as distinguished from a liability growing out of some maritime transaction not specifically connected with a particular vessel.

These questions and others have been discussed on one side and the other with zeal, learning, industry and ability. In the end both admit that there are things in the statute which do not fit in well with any theory as to the class of cases in which the government has consented to be sued, and that the result of the legislative history of the enactment does not make its interpretation easier. It is quite probable that somewhere in the United States there are even now pending cases in which some or all of these questions must be passed upon, but it does not appear that it will be necessary to do so in the one at bar.

There is no reason to suppose that Congress intended to make the United States sueable under any circumstances in which a suit could not have been instituted in this country, were the ship or cargo privately owned, and yet if the libellants' contention be sustained, that will be the result here. There was no privity of contract between the United States and the shippers of cargo by the Catskill, nor has the United States done them any actionable wrong. If it were an individual no proceeding in personam could be brought against it, either in admiralty or at common law. Nor could any libel be maintained against the ship in rem in any court of the United States, because none of them could have taken possession of her. The grant of jurisdiction made by the second section of the Act is expressly limited to such proceedings as "could be maintained at the time of the commencement of the action herein provided for" and in the instant case at that time, there was no court in the United States in which the suit could have been maintained either in rem or in personam, had an individual occupied the same relation to the cause of action as was borne by the United States.

25 Nor is this a narrow construction. It is one in perfect harmony with the most liberal and far reaching purpose which can reasonably be attributed to Congress. To hold that it intended that a citizen should be no worse off because of government ownership, is as far as any one will be justified in going. There is no reason to suppose that it intended to open the doors of its courts as against the United States to suits which could not there have been prosecuted against an individual or his property. The general language of every statute must be read in the light of the legislative intent insofar as that is unmistakably expressed.

It follows that as well when this libel was filed as now, this court was without jurisdiction to entertain it, and it must be dismissed.

26 *Decree of Court.*

Filed 4th June, 1921.

In the District Court of the United States for the District of Maryland.

In Admiralty.

BLAMBERG BROTHERS, a Body Corporate, Libelant,

vs.

THE UNITED STATES OF AMERICA, Respondent.

The above cause having been heard upon libel, answer, amended answer and/or suggestion of Respondent of want of jurisdiction and motion to dismiss libel therefor, and memorandum of libellant in reply to same.

Therefore it is this 4 day of June, 1921, by the District Court of the United States for the District of Maryland sitting in admiralty, adjudged, ordered, and decreed, that the libel filed herein be and the same is hereby dismissed for want of jurisdiction.

JOHN C. ROSE,
District Judge.

27 *Court's Certificate of Lack of Jurisdiction.*

Filed 4th June, 1921.

In the District Court of the United States for the District of Maryland.

BLAMBERG BROTHERS, a Body Corporate, Libelant,

vs.

UNITED STATES OF AMERICA, Respondent.

Certificate of Lack of Jurisdiction.

This cause came on to be heard upon libel, answer, amended answer, (and or suggestion of respondent of want of Jurisdiction and motion to dismiss libel therefor), and memorandum of libelant in reply to suggestion as to jurisdiction.

The libel is filed in personam against the United States of America under the provisions of the "Suits in Admiralty Act" of March 9th, 1920 (United States Compiled Statutes, section 1251-1.4 et seq.) and seeks to enforce a liability for non-delivery of cargo and cargo damage against the respondent when the res at the time of the commencement of this action and continuously since then has been located in the harbor of Havana, Cuba. The Respondent denies the jurisdiction of this Court in this cause to entertain any proceeding in Admiralty under the provisions of the aforesaid Act, contending that

had said res been privately owned no proceeding would lie, in this court under the circumstances of this case.

Now, therefore, it is certified that the question of the jurisdiction of this court, upon the grounds hereinbefore stated, to wit, (that at the time said libel was filed and now this court in this cause was without jurisdiction to entertain a libel either in personam or in rem under the Act of March 9, 1920, aforesaid) was the issue upon which this cause was decided. I having found that this Court was without jurisdiction and it was the duty of the court to dismiss the libel, which was accordingly done. I further certify that this is the only question of law upon the pleadings and process for the decision of the Supreme Court of the United States and that this certificate was granted at the term in which the decree in this cause was entered.

June 4, 1921.

JOHN C. ROSE,
District Court.

28 *Petition for Appeal and Order of Court Allowing Same.*

Filed 14th July, 1921.

In the District Court of the United States for the District of Maryland.

BLAMBERG BROTHERS, a Body Corporate,

vs.

UNITED STATES OF AMERICA.

To the Honorable John C. Rose, District Judge of the United States Court for the District of Maryland:

The above named Libellant feeling aggrieved by the decree rendered and entered in the above entitld case on the 4th day of June, Nineteen Hundred and Twenty-one, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith. And said Libellant prays that its appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was passed, duly authenticated, be sent to the Supreme Court of the United States, sitting in Washington, under the rules of such Court in such cases made and provided, and that the errors assigned may be corrected and the said decree of the District Court of the U. S. of the District of Maryland may be reversed.

And Your Petitioner further prays that the proper Order relating to the required security to be required of it, be made.

And as in duty bound, etc.,

TYLER AND ENGLAND,
HARRINGTON, BINGHAM AND ENGLAR,
Proctors for Blamberg Brothers, a Body Corporate, Lebellant.

29 Upon the motion of Tyler and England, Proctors for Libellant, it is hereby ordered that an appeal to the Supreme Court of the United States, from the decree heretofore filed and entered herein, be and the same is hereby allowed, and that a certified transcript of the Record, Libel, Answer, Amended Answer, Certificate of Respondent of want of jurisdiction, memorandum of Libellant in reply thereto, exhibits and all proceedings be forthwith transmitted to the Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $500.00/100 Dollars, for costs on appeal.

Dated 14" July, 1921.

JOHN C. ROSE,
U. S. District Judge.

30 *Assignment of Errors.*

Filed 14th July, 1921.

In the District Court of the United States for the District of Maryland.

No. 797. Admiralty.

BLAMBERG BROTHERS, a Body Corporate,

vs.

THE UNITED STATES OF AMERICA.

Assignment of Errors.

Now comes Blamberg Brothers, the libellant-appellant, by Tyler & England and Harrington, Bigham & Englar, its proctors, and having appealed, from the Final Decree of the District Court of the United States for the District of Maryland, entered in said Court on the 4th day of June, 1921, whereby the libel filed herein was dismissed for want of jurisdiction, to the Supreme Court of the United States, in a cause of contract and cargo damage, civil and maritime, assigns the following as the errors, on which it intends to rely, on said appeal:

The District Court of the United States of America for the District of Maryland erred: in that

(1) It held that it was without jurisdiction to entertain the libel filed herein.

31 (2) It held that the venue provisions of the Act of March 9th, 1920, 41 Statutes, 525, were not in the alternative, that is, allowing the filing of a libel in respect of suits authorized in said Act in either the place where the parties, or some of them, "reside or have their principal place of business in the United States, or in which the vessel * * * charged with liability is found."

(3) It held that an exclusively in rem liability attaching to a vessel owned by the United States could not, by virtue of said Act of March 9th, 1920, be enforced by a libel in personam against the United States, brought in the District in which the libellant had its principal place of business in the United States.

(4) It held that an in rem liability attaching to a vessel owned by the United States could not, by virtue of said Act of March 9th, 1920, be brought in a District other than a District in which the vessel so liable is found at the time of the filing of the libel.

Wherefore Libellants Appellants pray for a correction of the errors and that said decree of the District Court of the U. S. for the District of Maryland may be reversed.

TYLER & ENGLAND,
Office & P. O. Address: 612 *Equitable Building, Baltimore, Maryland, and*
HARRINGTON, BIGHAM & ENGLAR,
Office & P. O. Address: 64 *Wall Street, Borough of Manhattan, City of New York,*
Proctors for Libellant-Appellant.

32 *Appeal Bond.*

Filed August 5, 1921.

Know all men by these presents, That we, Blamberg Bros., Inc. as principal, and Maryland Casualty Company a Corporation of the State of Maryland, Baltimore, Maryland, as surety, are held and firmly bound unto United States of America in the full and just sum of Five Hundred—($500.00) dollars, to be paid to the said United States of America, its certain attorney, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 20th day of July, in the year of our Lord one thousand nine hundred and twenty one.

Whereas, lately at a District Court of the United States for the District of Maryland in a suit pending in said Court, between Blamberg Bros., Inc., vs. United States of America a decree was rendered against the said Blamberg Bros., Inc., and the said Blamberg Bros., Inc., having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Blamberg Bros., Inc., shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then

the above obligation to be void; else to remain infull force and virtue.

33 [Seal of Blamberg Bros., Inc.]

BLAMBERG BROS., INC.,
L. H. BLAMBERG,
Sec. Treasr.

[Seal of Maryland Casualty Company.]

MARYLAND CASUALTY COMPANY,
By WM. F. LEHNERT, *Attorney-in-Fact.*

Sealed and delivered in presence of
J. T. ENGLAND.
J WILSON.

Approved by—
JOHN C. ROSE,
U. S. District Judge for District of Maryland.

34 UNITED STATES OF AMERICA, *ss*:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the District Court of the United States for the District of Maryland, wherein Blamberg Brothers, a body corporate is Appellant and you are Appellee, to show cause, if any there be, why the judgment and decree rendered against the said Appellant as in the said Appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, this fifth day of August, in the year of our Lord one thousand nine hundred and twenty one.

[Seal of the United States District Court, Maryland.]

JOHN C. ROSE,
U. S. District Judge.

Attest:
ARTHUR L. SPAMER,
Clerk District Court of the United States for the District of Maryland.

[Endorsed:] Blamberg Bros. vs. U. S. of America. Citation retbl. 3 Sept.

Service of the within Citation acknowledged this 10th day of August, 1921.

ROBERT R. CARMAN,
U. S. Atty., Dist. Md.

35 *Stipulation of Counsel as to Making up Record.*

Filed 12th August, 1921.

In the District Court of the United States for the District of Maryland.

No. 797. Admiralty.

BLAMBERG BROTHERS, a Body Corporate,

vs.

UNITED STATES OF AMERICA.

It is stipulated and agreed by and between the parties to this cause that the transcript of record on appeal of Blamberg Brothers, to the Supreme Court of the United States in said cause shall consist of the following, viz:

1. Libel.
2. Answer of Respondent.
3. Suggestion of Respondent of Want of Jurisdiction.
4. Memorandum of Libellant in reply to Respondent's suggestion for want of Jurisdiction.
5. Opinion of the Court.
6. Decree of Court.
7. Court's certificate of lack of jurisdiction.
8. Petition for Appeal and Order allowing appeal.
9. Assignment of Errors.
10. Appeal Bond.
11. Citation.
12. This stipulation.
13. Memorandum of the Clerk.
14. Order to transmit Record.
15. Clerk's Certificate.

And it is further stipulated and agreed that the Clerk of this Court, shall make up a transcript of the record on appeal in this case, transmit the same to the Clerk of the Supreme Court of
36 the United States, and be printed in accordance with the Rules of that Court.

TYLER AND ENGLAND,
Proctors for Appellant.
ROBERT R. CARMAN,
Proctor for Appellee.

37 *Order to Transmit Record.*

And, thereupon, it is ordered by the Court here, that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Teste:

ARTHUR L. SPAMER,
Clerk.

38 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Maryland, To wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true transcript of the record and proceedings of the said District Court, together with all things thereunto relating in the therein entitled cause, made up in accordance with stipulation of counsel for the respective parties filed in said cause.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, this 12th day of August, 1921.

[Seal of the United States District Court, Maryland.]

ARTHUR L. SPAMER,
Clerk.

Endorsed on cover: File No. 28,467. Maryland D. C. U. S. Term No. 512. Blamberg Brothers, appellant, vs. The United States of America. Filed Sept. 3, 1921. File No. 28,467.

[redacted]

October Term, 1952

[redacted]

[redacted]

Appellant,

—against—

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT.

D. ROGERS MAGLAR,
JAMES W. RYAN,
J. EDWARD TYLER, JR.,
Counsel for Appellant.

SUBJECT INDEX.

LIST OF AUTHORITIES CITED:

SUPREME COURT OF THE UNITED STATES,

October Term, 1922.

BLAMBERG BROTHERS,

Appellant,

—against—

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT.

Statement of the Case.

This is an appeal from a decree of the District Court of the United States for the District of Maryland dismissing a libel against the United States under the Suits in Admiralty Act of March 9, 1920, for want of jurisdiction. The decree is based on the theory that the clause in Section 2 of that Act, providing that suit may be brought in cases where if the vessel were privately owned "a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for," really means, provided "a proceeding in admiralty could be maintained IN THE UNITED STATES OF AMERICA at the time of the commencement of the action herein provided for." The sole issue is whether the lower Court was justified in interpolating the words "in the United States of America" into that clause of the statute. If the vessel had been privately owned at the time the action in the

present case was commenced, the appellant admittedly could have maintained a proceeding in admiralty against her in the port of Havana, Cuba. Such proceedings were in fact maintained against her by others (Suggestion of Want of Jurisdiction, par. 5; Record, p. 11; Motion of United States to Advance, p. 2).

The opinion of the lower Court (p. 14, Record; 272 Fed. 978) does not disclose the reason actuating the Court in requiring, as an additional condition precedent to suit, the ability to maintain the admiralty proceeding within the particular geographical limits of the United States, other than the general statements that "the principal purpose of the statute under which the proceeding was brought, was to prevent WITHIN THE UNITED STATES, the arrest upon judicial process of any government-owned ship;" that "there is no reason to suppose that Congress intended to make the United States suable under any circumstances in which a suit could not have been instituted IN THIS COUNTRY, were the ship or cargo privately owned, and yet if the libellant's contention be sustained, that will be the result here;" that no libel could have been "maintained against the ship *in rem* in any Court OF THE UNITED STATES, because none of them could have taken possession of her;" that "there was no Court IN THE UNITED STATES in which the suit could have been maintained either *in rem* or *in personam* had an individual occupied the same relation to the cause of action as was borne by the United States;" and that "there is no reason to suppose that it (Congress) intended to open the doors of its Courts as against the United States to suits which could not THERE have been prosecuted

against an individual or his property." There is nothing else in the opinion that would support the decision. It is clear that the decision would have been otherwise if the vessel had been within the United States, no matter in what district.

In a subsequent case on identical facts (*Smith* v. *United States;* opinion, August 4, 1922, as yet unreported, copy annexed hereto as Appendix A), Judge Foster of the District Court of the United States for the Eastern District of Louisiana, declined to follow the decision of Judge Rose in the present case, saying:

> "The defendant raises the question of jurisdiction. It is argued that there is no jurisdiction in any U. S. District Court unless the vessel is within the reach of the process of the Court, or at least within the territorial limits of the United States, as otherwise no Court in the United States would have jurisdiction *in rem;* that the vessel having changed owners after the claim for wages accrued, there could be no action *in personam* against the present owner if the vessel was owned by private parties. To support this the case *Blamberg* v. *U. S.*, 272 F. 978, is relied on. Considering the learning and experience of Judge Rose, this decision is undoubtedly entitled to great weight, but I am constrained to hold differently.
>
> The Act of March 9, 1920 contains no restriction in terms such as imposed by the decision in *Blamberg Bros.* v. *U. S. supra.* In fact, considering the divisions of Section 7, Congress seems to take the position that a vessel owned by the United States Shipping Board cannot be seized *in rem* in any country."

Section 7 of the Act provides, in substance, that if a vessel owned by the United States is arrested in a foreign country the United States Consul shall file a claim that she is immune from arrest.

Moreover, the opinion of the lower Court in the present case does not mention the fact that, if its conclusion is correct, Section 5 of the Act, limiting the period within which suits may be brought to two years, might, in connection with Section 7, providing that vessels of the United States Government are immune even though in a foreign country, deprive libellants in this and other similar cases of any remedy whatever, inasmuch as the vessel involved might not (and in this case, as the event proves, did not) return to the United States within two years.

Statement of the Facts.

On July 26, 1920, the United States agreed to sell its schooner barge, the Catskill, to the Guidera Towing and Transportation Company for $60,000, payable in installments. On payment of the first installment the purchaser went into possession, although the United States retained title until payment of the final installment. No installment other than the first has been paid.

On October 6, 1920, at Baltimore, Blamberg Brothers, a Maryland corporation, the libellant, shipped on the Catskill 1,500 bags of corn for carriage to Havana, Cuba. The Catskill arrived at Havana in November, 1920, but failed to deliver the corn to the consignee, and admittedly, if owned by a private merchant, would have become liable *in rem* for libellant's damages, and, if so owned, an action could have been maintained

against her in Havana. On February 26, 1921, the Catskill being still in Havana with the corn on board, the libellant filed in the District Court of the United States for the District of Maryland, where it was incorporated and had its principal place of business, a libel against the United States under the Suits in Admiralty Act of March 9, 1920, "to recover against the government the liability *in rem* of the barge for the non-delivery of libellant's goods." (Opinion, lower Court, p. 14, Record.)

On April 22, 1921, the United States, appearing generally, filed an answer alleging lack of knowledge and demanding strict proof of all the allegations of the libel, but alleging that it "is advised that said barge Catskill is presently at Havana, Cuba, and has no knowledge of its own as to when the said barge is expected to arrive in this jurisdiction," and that, although at the time the corn was shipped the United States was "the qualified owner of the said barge Catskill," the Guidera Towing and Transportation Company had "complete control and custody" of her under the purchase agreement. A copy of the purchase agreement was annexed to the answer. In the eighth paragraph of the answer the United States admitted "the admiralty and maritime jurisdiction of this Honorable Court."

Before the cause was reached for trial, the United States, on May 3, 1921, filed a Suggestion, in the nature of a special appearance for the purpose of questioning the jurisdiction, alleging "that the said barge is now at the port of Havana, Cuba, without the jurisdiction of this Honorable Court and has been libelled in the sum of $3,725 for wage claims;" that the United States "cannot be proceeded against" for the *in rem* liability of the

Catskill, because at the time this libel was filed she was in Havana; and that, if it is suggested that the United States is liable not only for the *in rem* liability of the barge but also for an *in personam* liability as owner of the barge at the time the corn was shipped, the United States "cannot be proceeded against in an action *in personam*" on this latter liability, because no such liability was created.

On May 5, 1921, the libellant filed a "Memorandum in reply to the Suggestion filed by the Repondent" admitting the facts alleged in the Suggestion, and alleging that "your libellant is proceeding by a libel *in personam* against the respondent, as owner of the said barge Catskill, to establish a liability of the said barge Catskill, as provided for in the Act of Congress, approved March 9, 1920, commonly known as 'The Suits in Admiralty Act,'—the right to bring said libel *in personam* being created by said Act as a substitute for the ordinary libel *in rem*," and denying that "the jurisdiction of this Court over the matters alleged in the libel is dependent on finding said barge Catskill within the jurisdiction of this Honorable Court."

On May 31, 1921, the lower Court filed an opinion directing the entry of a decree dismissing the libel on the ground that, although if the vessel had been privately owned at the time the action was commenced, the libellant could have maintained a proceeding in admiralty against her in Havana, Cuba, it could not have maintained such a proceeding against her within the territorial limits of the United States.

On June 4, 1921, a decree was entered dismissing the libel for want of jurisdiction.

On the same day the lower Court issued a certificate stating that the libel "seeks to enforce a liability for non-delivery of cargo and cargo damage against the respondent when the *res* at the time of the commencement of this action and continuously since then has been located in the harbor of Havana, Cuba. The respondent denies the jurisdiction of this Court in this cause to entertain any proceeding in Admiralty under the provisions of the aforesaid Act, contending that had said *res* been privately owned no proceeding would lie, *in this Court* under the circumstances of this case. Now, therefore, it is certified that the question of the jurisdiction of this Court, upon the grounds hereinbefore stated, to-wit (that at the time said libel was filed and now this Court in this cause was without jurisdiction to entertain a libel either *in personam* or *in rem* under the Act of March 9, 1920, aforesaid) was the issue upon which this cause was decided."

On July 14, 1921, the libellant filed a petition for an order allowing an appeal to this Court, which was granted.

On the same day the libellant filed the following assignments of error:

(1) The Court erred in holding that it was without jurisdiction to entertain the libel filed herein;

(2) The Court erred in holding that the venue provisions of the Act of March 9, 1920, were not in the alternative, that is, allowing the filing of a libel in respect of suits authorized in said Act in either the place where the parties, or some of them, "reside or have their principal place of business in the United States, or in which the vessel * * * charged with liability is found."

(3) The Court erred in holding that an exclusively *in rem* liability attaching to a vessel owned by the United States could not, by virtue of said Act of March 9, 1920, be enforced by a libel *in personam* against the United States, brought in the District in which the libellant had its principal place of business in the United States.

(4) The Court erred in holding that an *in rem* liability attaching to a vessel owned by the United States could not, by virtue of said Act of March 9, 1920, be brought in a District other than a District in which the vessel so liable is found at the time of the filing of the libel.

On December 5, 1921, the appellant moved that the case be advanced for hearing. The motion was denied without prejudice to its submission upon printed briefs.

Shortly thereafter the Solicitor General moved that the case be advanced for hearing on the ground that "the jurisdictional questions presented by the appeal are highly technical and of unusual importance. Brief oral argument ought to assist in their proper presentation. * * * The jurisdiction of the District Courts in proceedings brought under the act must be speedily determined, as otherwise there will be continued uncertainty and embarrassment to the Government in the conduct of a class of litigation, considerable in amount, to the serious prejudice of the Government." The motion further stated (page 2, Motion to Advance), that "The barge was attached in Cuba in other proceedings filed against her there, and since the barge has been under attachment in Cuba." The motion was granted and the cause assigned for argument on December 4, 1922.

POINTS.

I.

The remedy afforded by Section 2 of the Act of March 9, 1920, is not limited to cases where, if the vessel were privately owned, a proceeding in admiralty could have been maintained within the territorial limits of the United States, but is available generally to all persons who could have maintained proceedings in admiralty against vessels of the United States anywhere in the world prior to the passage of this act.

The Act under which this suit is brought, has been construed in a number of decisions of various District Courts, but we have found only two cases in which the precise point involved in the present case appears to have been presented. In one of these cases, the Court expressly declined to follow the decision of Judge Rose in the present case; and in the other case the Court appears to have reached the conclusion (through a misapprehension as to the facts of the present case) that the cases were distinguishable.

In *A. Marion Smith* v. *United States* (unreported, opinion annexed hereto as Appendix A; Aug. 4, 1922; U. S. D. C. E. D. La.) a libel was filed "in the nature of an action *in rem* against

the vessel but is brought *in personam* against the United States under the provisions of Section 2 of the Act of Mar. 9, 1920, 41 S. 525." There being no privity of contract between the libellant and the United States, there was only an *in rem* liability of a vessel owned by the United States. The material facts are therefore identical with those in the present case. The libel was filed in the district where the libellant resided. The United States apparently excepted to the libel on the ground that as the vessel was not within the territorial limits of the United States or its possessions the libel could not be maintained in any district. The vessel, at the time the libel was filed, appears to have been in Buenos Aires, or on the high seas on a voyage from Buenos Aires to Liverpool, or in Liverpool. Judge Foster, in refusing to follow the decision of Judge Rose in the present case, said:

> "The defendant raises the question of jurisdiction. It is argued that there is no jurisdiction in any U. S. District Court unless the vessel is within the reach of the process of the Court, or at least within the territorial limits of the United States, as otherwise no Court in the United States would have jurisdiction *in rem;* that the vessel having changed owners after the claim for wages accrued, there could be no action *in personam* against the present owner if the vessel was owned by private parties. To support this the case of *Blamberg Bros.* v. *U. S.*, 272 F. 978 is relied on. Considering the learning and experience of Judge Rose this decision is undoubtedly entitled to great weight, but I am constrained to hold differently.

> "The Act of March 9, 1920 contains no restriction in terms such as imposed by the decision in *Blamberg Bros.* v. *U. S., supra,* In fact, considering the divisions of Section 7, Congress seems to take the position that a vessel owned by the United States Shipping Board can not be seized *in rem* in any country."

In *Phoenix Paint & Varnish Co.* v. *United States* (unreported opinion annexed hereto as Appendix C.; Nov. 17, 1921; U. S. D. C. E. D. Pa.) the same point appears necessarily to have been decided. The libel was against the United States under the Suits in Admiralty Act for supplies furnished, apparently not at the request of the United States, to a vessel owned by the United States. Apparently therefore the suit was the same as in the case at bar, that is, on a solely *in rem* liability of the vessel. At least it is only that aspect of the case that is discussed or decided. The libel was filed in the district where the libellant resided. *The vessel was not within the district and it does not appear where she was.* The Court apparently believed that, in view of the election of the libellant to sue in the district of his residence, it was immaterial where the vessel might be. The United States excepted to the libel on the ground that it did not allege that the vessel was within the district. Judge Dickinson, in overruling the exception, said:

> "That act in effect declares that when there is a cause of action of this general nature which, under the law, could be enforced against a private person or against property owned by such person, it may be enforced against the United States with

this difference. The Act assumes that a cause of action may be such that if a private person were the respondent it might be enforced by process *in personam* or *in rem*. In such a case it shall not be enforced *in rem* against property of the United States, but may be enforced against the United States *in personam*, but shall be enforced as if it were process *in rem*, and that the process may issue from any Court within whose territorial jurisdiction the libellant resides or a Court within whose like jurisdiction the *rem* may be. The libellant resides within this District, and the proceedings are on their face at least, in accordance with the Act of Congress."

And speaking of the decision of Judge Rose in the present case, Judge Dickinson said:

"The present stage in the proceedings which we have reached is in substance a motion to dismiss for want of jurisdiction. The basis of the exceptions taken to the libel, as we grasp the thought back of them, can be best presented by a citation of the case of *Blamberg Bros.* v. *United States*, 272 Fed. Rep. 978, upon which the respondent relies. That case, however, is not in point. It was ruled upon the proposition that the Act of Congress gave no permission to proceed unless the libel be one which could be sustained if it were against a private person or the property of a private person. The libel there could not have been so sustained, and what would follow the ergo is too obvious to require statement.

"In the case at bar the libel could be maintained as against a private individual unless it failed because a good defence was

> interposed. It follows that we cannot dispose of the motion to dismiss without deciding the cause, and this we cannot do at the present stage of the proceedings."

Judge Dickinson thus appears to have misapprehended the decision of Judge Rose in the present case. Judge Rose obviously did not decide that the libellant in the present case could not at the time its libel against the United States was filed have maintained a proceeding against the "Catskill" if it had been "the property of a private person." He merely held that such proceeding could not have been maintained in the United States. Apparently therefore, Judge Dickinson on the same facts would have refused to follow the decision of Judge Rose. Judge Dickinson stated, as the holding of Judge Rose in the present case, the proposition for which we are contending.

I-A—THE EFFORT OF THE LOWER COURT TO READ INTO THE FIRST SENTENCE OF SECTION 2 OF THE ACT A REQUIREMENT THAT THE HYPOTHETICAL PROCEEDING IN ADMIRALTY BE MAINTAINABLE WITHIN THE TERRITORIAL LIMITS OF THE UNITED STATES IS BASED ON A MISTAKEN ASSUMPTION THAT CONGRESS INTENDED TO PREVENT THE ARREST OF VESSELS ONLY WITHIN THE UNITED STATES. THE COURT DOES NOT MENTION AND APPARENTLY OVERLOOKED THE FACT THAT CONGRESS, BY SECTION 7 OF THE ACT, INDICATED AN INTENTION THAT THE VESSELS SHOULD BE IMMUNE FROM ARREST EVEN IN FOREIGN COUNTRIES.

In *Smith* v. *United States, supra,* Judge Foster, declining to follow the decision of Judge Rose in the present case, said:

> "In fact, considering the provisions of Section 7, Congress seems to take the position that a vessel owned by the United States Shipping Board can not be seized *in rem* in any country."

Section 7 of the Suits in Admiralty Act of March 9th, 1920, provides:

> "Sec. 7. That if any vessel or cargo within the purview of Sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any Court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said Court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter

the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the Clerk of the Court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments; *Provided, however*, that nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case."

It clearly appears from Section 7, and the other sections of the Act, that Congress was dealing with causes of action against merchant vessels owned by the United States, no matter where they might be, and that the substitute remedy against the United States *in personam* created by the Act, was to be available, to everyone hav-

ing such a cause of action, at all times within two years after the particular cause of action arose.

This conclusion is also supported by the fact that if the substitute remedy were not available so long as the vessel remained outside the United States, Section 5 of the Act would deprive the libellant of any remedy in cases like the present, where the vessel did not return within the time provided for suit. Section 5 of the Act of March 9th, 1920, provides:

> "Sec. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises."

The effort of the lower court to read into the first sentence of Section 2 a requirement that a proceeding be maintainable in the United States does violence to the plain meaning of the language used. The first sentence says that the proceeding must be maintainable. It does not specify where it must be maintainable. In the absence of specific limtiation, the requirement is completely satisfied if the proceding is maintainable anywhere. In the present case the proceeding was maintainable against the "Catskill" in Havana, Cuba (p. 11, Record; par. 5, Suggestion of Want of Jurisdiction; Motion to Advance, p. 2).

1-B—CONGRESS INTENDED BY THE ACT NOT ONLY TO PREVENT THE ARREST OF VESSELS, BUT ALSO TO ENCOURAGE LIBELLANTS WHO MIGHT HAVE CLAIMS MAINTAINABLE AGAINST THE VESSELS IN FOREIGN COUNTRIES TO BRING THEIR PROCEEDINGS *IN PERSONAM* IN THE UNITED STATES.

The argument of the Government and the decision of Judge Rose proceed on the assumption that the United States Government desired to force its citizens to sue its vessels in the courts of foreign countries wherever this remedy was available to them, although opening its own courts to such suits where jurisdiction could be had only in those courts. To state this proposition is to answer it. As might be expected, this view finds no support in the language of the Act. On the contrary, as pointed out by Judge Foster in the case of *Smith v. United States, supra*, Section 7 of the Act indicates an intent by Congress to prevent, as far as lay in its power, the seizure of vessels of the United States in foreign countries as well as in the United States; and to concentrate all such litigation in its own courts.

Moreover, the United States would thus avoid incurring the expense of furnishing surety bonds, and of retaining counsel to defend it in litigation in foreign countries.

The intention of Congress to discourage suits against United States vessels in foreign countries is shown by the provision in Section 7, that the United States Consul, if so directed by the Secretary of State, shall "claim such vessel or cargo as immune from such arrest."

I-C—CONGRESS CLEARLY INTENDED BY THE ACT TO SUBSTITUTE THE PERSONAL CREDIT OF THE UNITED STATES FOR THE SECURITY OF THE PARTICULAR VESSEL. IN THE PRESENT CASE THE LIBELLANT HAD A RIGHT TO ARREST THE "CATSKILL" AS SECURITY FOR ITS CLAIM. HAVING THAT RIGHT IT WAS WITHIN THE CLASS OF VESSEL CREDITORS ENTITLED TO SUE THE UNITED STATES *IN PERSONAM*.

Section 8 of the Act, providing that decrees in suits under the Act shall be payable "out of any money in the Treasury of the United States not otherwise appropriated," is substantially a pledge by the United States of those unappropriated moneys in the Treasury as a fund or stipulation to meet the liabilities incurred by the Shipping Board's vessels. This general pledge or stipulation was apparently intended as a substitute for multitudinous stipulations to release individual vessels from arrest. This pledge by the United States of all its unappropriated moneys or of its general credit was intended to be available to everyone who previously had a right to have a United States vessel arrested as security.

This is confirmed by the last two sentences of Section 3, which read:

> "Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United

> States Shipping Board or the United States Shipping Board Emergency Fleet Corporation shall become void and be surrendered and cancelled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause and assumes liability to satisfy any decree included within said bond or stipulation and thereafter any such decree shall be paid as provided in Section 8 of this Act."

This intent is also shown by the provision in Section 7 that in order to release one of the vessels described in the Act from arrest in a foreign country—

> "The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm or corporation, in the United States, its territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation, as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation";

and that the United States Consul, on direction from the Secretary of States, may

> "execute an agreement, undertaking, bond or stipulation for and on behalf of the United States or the United States Shipping Board, or such corporation as by said court required for the release of such vessel or cargo, and for the prosecution of any appeal."

I-D—IF CONGRESS INTENDED TO PREVENT VESSELS FROM BEING DELAYED BECAUSE OF ARREST UNDER LEGAL PROCESS, THE THEORY OF THE LOWER COURT THAT THE LIBELLANT IN THE PRESENT CASE SHOULD HAVE ARRESTED THE VESSEL IN CUBA RATHER THAN HAVE BROUGHT A SUIT *IN PERSONAM* AGAINST THE UNITED STATES WOULD, BY ENCOURAGING DELAY TO THE VESSEL, VIOLATE THE INTENTION OF CONGRESS.

Counsel for the United States contended in the court below that the purpose of the Act was to prevent vessels owned by the United States from being delayed because of arrest under legal process. It was asserted that the delay of only one day to any one of the larger Government vessels would, in view of their great value, result in a great loss of money; yet the theory of counsel for the United States, adopted by the lower court, would require that the libellant in the present case actually arrest the United States vessel in Cuba rather than bring a suit *in personam* against the United States in this country. If a proper stipulation were not promptly filed or a claim of immunity made by the United States, this arrest would result in delay to the vessel. Therefore, a denial to the libellant of a right to maintain the present proceeding would violate the intent of Congress, as interpreted by counsel for the United States.

The argument of the Government in the court below was that the "Catskill" would not have been delayed by any additional libels filed in Cuba

because she had already been attached and detained in suits brought there by other libellants. It is clear, however, that the interpretation of the Act cannot be varied in each particular case. The Act must be given a uniform general interpretation, and it is immaterial whether, in this particular case, the Government deemed it advisable to file a stipulation, and whether this particular vessel would or would not have been delayed by the filing of an additional libel in Cuba.

I-E—CONGRESS INTENDED TO GRANT A RIGHT TO SUE THE UNITED STATES *IN PERSONAM* TO EVERYONE WHO HAD A CAUSE OF ACTION AGAINST THE VESSEL UNDER SECTION 9 OF THE SHIPPING ACT OF 1916.

Although Section 9 of the Shipping Act of 1916 is not mentioned *eo nomine* in the Suits in Admiralty Act, a mere reading of them shows that the Suits in Admiralty Act, by substituting a new remedy, has repealed Section 9 of the Shipping Act so far as remedy (as distinguished from liability) is concerned. Section 13 of the Suits in Admiralty Act repeals all Acts inconsistent with its provisions.

Section 9 of the Shipping Act of 1916, so far as here material, provides:

> "Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely

> as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

It is apparent from a reading of the Suits in Admiralty Act that Congress undertook comprehensively to provide a remedy *in personam* in each case in which any merchant vessel owned by the United States might be subject to arrest anywhere in the world. The libellant clearly had a right to have the "Catskill" arrested at Havana, under Section 9 of the Shipping Act of 1916, as its right or cause of action was complete. It follows that it had a remedy by suit *in personam* against the United States in any of the Districts mentioned in the second sentence of Section 2 of the Suits in Admiralty Act.

I-F—THIS WOULD BE SO EVEN IF THE LIBELLANT HAD NO PRESENT ABILITY TO ARREST THE VESSEL, PROVIDED IT HAD A RIGHT OR CAUSE OF ACTION AGAINST HER.

Section 9 of the Shipping Act of 1916 was repealed by the Suits in Admiralty Act of March 9th, 1920, so far as remedy was concerned, but was not repealed as to liability of or causes of action against merchant vessels owned by the United States. Sections 1 and 7 of the Suits in Admiralty Act repeal the remedy provided by Section 9 of the Shipping Act of 1916. The first sentence of Section 2 of the Suits in Admiralty Act defines that part of Section 9 of the Shipping Act of 1916 which is not repealed. In other

words, the first sentence of Section 2 of the Suits in Admiralty Act deals only with causes of action, substantive rights or liabilities. The second sentence deals only with venue. Therefore, the phrase in the first sentence, if "a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for" requires only that the cause of action or substantive right be of an admiralty nature, and was merely intended to exclude common law causes of action on which the vessel might be arrested under foreign attachment.

The lower court and counsel for the United States endeavored to read into the first sentence a condition as to venue; that is, that the action be maintainable in the United States.

The first sentence does not require that the libellant be able to arrest the vessel at the time he files his libel. It merely requires that he have an admiralty cause of action enforcible, if the vessel were privately owned, on her coming within the Court's territorial jurisdiction. Congress eliminated from the original bill a proposed requirement in the first sentence that the substitute remedy should be available only if, in addition to there being an admiralty cause of action "the vessel or cargo could be arrested or attached at the time of the commencement of suit." The original bills (H. R. 7124, July 1, 1919, and S. 2253, June 23, 1919) provided, in Section 1, that the United States could be sued *in personam*:

> "* * * for any cause of action of which said courts ordinarily have cognizance in their admiralty and maritime jurisdictions, arising since April 6, 1917, out of or in connection with the possession, operation

> or ownership by the United States * * * of any merchant vessel, or the possession, carriage or ownership by the United States, or such corporation, of any cargo in those cases where, if the United States were suable as a private party, a suit *in personam* could be maintained, or where, if the vessel or cargo were privately owned and possessed, a libel *in rem* could be maintained *and the vessel or cargo could be arrested or attached at the time of the commencement of suit.*"

The same language, with the substitution of the phrase "suit *in rem*" for the phrase "libel *in rem*" is used in Senate Bill S. 3076, introduced September 25, 1919, as a substitute for Senate Bill S. 2253. Senate Bill S. 3076 was enacted by the Senate in this form, and sent to the House. The House substituted an entirely new draft, known as "The Attorney General's Substitute," which was agreed to by the Senate and became, in substance, the Act of March 9, 1920. The phrase "and the vessel or cargo could be arrested or attached at the time of the commencement of suit" does not appear in the Act as passed. This phrase was in the original drafts of the Bill and in S. 3076 as first passed by the Senate. Its elimination indicates that the requirement that the vessel could be "arrested or attached" was in excess of the requirement that "a suit *in rem* could be maintained." As finally passed, therefore, the Act merely requires the libellant to show that his cause of action or substantive right is one such as District Courts "ordinarily have cognizance" of "in their admiralty and maritime jurisdictions."

We, therefore, submit that Congress intended to provide a remedy *in personam* against the United States in every case in which the vessel, if privately owned, would be liable *in rem*. The physical presence of the vessel in the United States rather than in a foreign country was neither an express nor an implied condition of this relief.

I-G—THE INTENTION OF CONGRESS IS EXPRESSED IN UNAMBIGUOUS LANGUAGE. IT IS, THEREFORE, UNNECESSARY TO RESORT TO HEARINGS BEFORE CONGRESSIONAL COMMITTEES OR OTHER EXTRINSIC AIDS TO INTERPRETATION.

It is elementary that aids to the interpretation of a statute may only be used when the intent of Congress may not be gathered from the wording of the Act or the language used is ambiguous.

In *City of New York* v. *Whitridge*, (1919), 227 N. Y. 180, this rule was aptly expressed. The Court said:

> "The legislative intent is found in the legislative language which, as this Court has had occasion to say, unqualifiedly commands."

In *Matter of Dean*, (1920), 230 N. Y. 1, the Court said:

> "Manifestly the plain meaning of a statute cannot be changed by extrinsic evidence or unjustifiable interpretation."

In *Bate Refrigerating Company* v. *Sulzberger*, (1895), 157 U. S. 1, at page 36 this Court stated:

> "In our judgment the language used is so plain and unambiguous that a refusal

> to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But as declared in *Hadden* v. *Collector*, 5 Wall, 107, 111, 'What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit' this court has said, 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature.'"

Judge Rose in the lower court decided this case upon his view of what the unexpressed intention of Congress was. Judge Foster decided the *Smith* case (Appendix A, hereto) upon the expressed intention of Congress contained in the Statute itself. It is almost obvious that where no ambiguity exists in a statute, resort to interpretation is unnecessary, and in all cases, in the construction of a statute, the express intention of the lawmaking body governs.

If Congress had intended that the Act should have the narrow scope contended for by counsel for the United States in this case, it could easily have expressed itself to that effect. The words themselves are perfectly plain. The Act does not state that the place in which the proceeding could be maintained were the vessel privately owned or possessed has any bearing on the right of action, but merely that "in cases where if such

vessel were privately owned or possessed" a proceeding in admiralty could be maintained, a libel *in personam* may be brought.

It is no hardship for the United States to be sued in this case in the District of Maryland. The contract of affreightment was entered into there, nearly all the witnesses are there, and to force the libellant to bring its action in the district in which the vessel happens to arrive on her return to the United States would do violence to the clear terms of the Act, which provide that suit may be brought in the district where the libellant resides or has its principal place of business.

I-H—THE LOWER COURT, IN ORDER TO SUPPORT ITS THEORY, WAS COMPELLED TO IGNORE THE PLAIN LANGUAGE IN THE FIRST SENTENCE OF SECTION 2 AND TO RESORT TO EXTRINSIC AIDS TO INTERPRETATION.

Counsel for the United States in the lower court, in endeavoring to show the intention of Congress, relied largely on hearings before Congressional Committees. The testimony before these committees was largely by a lawyer who, although not a member of Congress, had, as counsel for the Shipping Board, drafted a proposed Bill, which differs substantially from the Act as passed. The hearings show conclusively that almost all his testimony was directed toward the Bill that he had drafted. Although his testimony, it is believed, is more harmful than helpful to the Government, we submit that this Court should not resort to such testimony for guidance as to the meaning of the Act.

II.

The United States, by appearing generally and answering in this suit, there having been at the time the suit was commenced jurisdiction of the person or vessel at Havana, waived any requirement as to venue or jurisdiction of the person.

In *United States* v. *Hvoslef*, 237 U. S. 1, 11, Mr. Justice Hughes delivering the opinion of this Court, said:

> "Another objection to the jurisdiction of the District Court is that under section 5 of the Tucker Act * * * the suit was to be brought 'in the district where the plaintiff resides.' 24 Stat. 506. * * * It is said that the allegation was insufficient to show the residence required by the statute. * * * But assuming that the subject matter was within the jurisdiction of the court the requirement as to the particular district within which the suit should be brought was but a modal and formal one which could be waived, and must be deemed to be waived in the absence of specific objection upon this ground before pleading to the merits. *St. Louis Ry.* v. *McBride*, 141 U. S. 127, 131; *Central Trust Co.* v *McGeorge*, 151, U. S. 129, 133; *Martin* v. *Balt. & Ohio R. R.*, 151 U. S. 673, 688; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217, 220; *Western Loan Co.* v. *Butte & Boston Mining Co.*, 210 U. S. 368; *Arizona & New Mexico Ry.* v. *Clark*, 235 U. S. 669, 674."

The subject matter of the suit in the case at bar, the liability of a vesel *in rem* for non-delivery of and damage to cargo, is unquestionably within the admiralty jurisdiction of the court. The United States must either contend that the "Catskill" was immune from arrest in Havana in any proceeding in admiralty filed by your libellant or admit that such proceeding could be maintained in Havana. If immune, Congress clearly intended to substitute a remedy *in personam* against the United States. If not immune, the question, so far as the United States was concerned, was merely one of mode or venue. A suit in Havana against a vessel owned by the United States would be a suit against the United States. *The Western Maid*, 257 U. S. 491. The United States might well prefer that suits against it be instituted in this country where its attorneys reside. This preference was shown in the present case on April 22, 1921 by answering generally.

III.

It was unnecessary for the libellants in this case to elect whether to proceed *in personam* or *in rem;* but the libellant did in fact elect to proceed in accordance with the principles of libels *in rem.*

It was suggested, by counsel for the Government, in the Court below, that the appellant could not recover because it had not elected, in its libel, to have the case proceed in accordance with the principles of libels *in rem* as permitted under

Section 3 of the suits in Admiralty Act. The provisions of the Act on this point are somewhat obscure and it is difficult to determine, with certainty, the purpose for which they were inserted. We sumbit, however, that this provision for election by the libellant cannot be construed as a limitation of the remedies granted to the libellant in the preceding section (Section 2) of the Act. The provision of Section 3 with respect to election by the libellant is permissive in form and was clearly designed to afford additional protection to the libellant. Apparently, it was inserted out of an abundance of caution to insure that the change in the form of procedure (from *in rem* to *in personam*) should not prejudice any rights which the libellant would have had in a proceeding *in rem* against a Shipping Board vessel under Section 9 of the Act of 1916. The language of the provision with respect to election clearly indicates that it relates to matters of procedure and to the rights of libellants *inter sese*, rather than to the cause of action in respect of which the libel is filed.

Having previously (in Section 2) granted the right to file a libel *in personam* in every case where "a proceeding in admiralty could be maintained," if the vessel were privately owned, it is scarcely to be assumed that Congress intended to limit or qualify this grant in a later section by a clause which, in form, purports to grant additional protection to the libellant.

We deem it unnecessary, however, to argue this point at length, for the reason that there was a clear election by the libellant in this case to have the litigation proceed in accordance with the principles of libels *in rem*. It is true that the libel,

as originally filed, did not contain any express election. Shortly after the filing of the libel and answer, however, the Government filed a Suggestion of Want of Jurisdiction and the appellant filed a reply to this suggestion. In Paragraph 6th of this reply the appellant said:

> "Your libellant is proceeding by a libel *in personam* against the respondent, as owner of the said barge 'Catskill,' to establish a liability of the said barge 'Catskill,' as provided for in the Act of Congress, approved March 9, 1920, commonly known as 'The Suits in Admiralty Act'—the right to bring said libel *in personam* being created by said Act as a substitute for the ordinary libel *in rem*."

No objection was made to this reply and the case actually proceeded to trial on the Government's suggestion and the appellant's reply. This appears clearly from the statement of Judge Rose in his opinion that

> "This libel has been filed to recover against the Government the liability *in rem* of the barge for the non-delivery of libellants' goods."

Even if this Court should hold that this appellant can only succeed by virtue of an election to have the litigation proceed in accordance with the principles of libels *in rem*, it can scarcely be argued that the libellant must fail because the election was not physically incorporated in the original libel but in a separate document. The Government's suggestion and the appellant's reply were clearly intended as supplements or amendments to the answer and libel, respectively.

The Admiralty Courts have always exercised the utmost liberality in the matter of amendments to pleadings, and where the issues are fully and clearly set forth in pleadings filed and received without objection by either party, we submit that this Court will not entertain, at this late date, any technical objection based on the informal character of the pleadings. This is particularly true where the case proceeded to trial and was decided on the pleadings as actually filed, without any such objection being raised. If any authority be required on this proposition, we call the Court's attention to the following case:

DuPont v. *Vance*, 19 How. (U. S.) 162.

IV.

There is nothing in the language of the act to indicate that the right to sue in the district of libellant's residence is limited to cases where, if the vessel were privately owned, an action *in personam* could have been maintained against the owner.

In the lower court the Government insisted that much significance attached to the alternative venue granted in Section 2 of the Act. Although the point was not decided by Judge Rose, the Government argued with great emphasis that the alternative provisions as to venue were not applicable in all cases, but that they must be

applied separately to different classes of cases, *i. e.*, that the provision allowing suit in the district of the libellant's resident was applicable only in suits to enforce an *in personam* liability, and the provisions allowing suit in the district where the vessel could be found was applicable only in suits to enforce an *in rem* liability.

We submit that the language used is quite simple and natural, in view of the subject matter, and requires no close analysis or labored explanation. The option given to the libellant by this Act is one which he has in the great majority of cases where suit is brought against a private owner or his vessel. Where, as frequently happens, the libellant has his option to proceed against either the owner *in personam* or the vessel *in rem*, it naturally follows that he has the option to sue either in his own district (if the owner can be found there) or in the district where the vessel can be attached. Congress granted to the libellant the same options in this Act, using general language without any qualifying words to indicate that certain classes of suits could only be brought in a certain district or jurisdiction. The Government's argument amounts to this, that if Congress had expressed its intention fully, it would have said that an *in rem* liability could only be enforced in the district where the vessel could be found; an *in personam* liability only in the district where the libellant resides or has his principal place of business; and (if we understand the argument correctly) a liability existing both *in rem* and *in personam* in either district. What Congress might have said if these various situations had been specifically brought to its attention is an

interesting matter for speculation; but we think such speculation is too attenuated to be used as the foundation for a strained and artificial construction of the clear and simple language of the second sentence of Section 2 of the Act. Nor does this language seem to us to require any explanation. There is ample precedent for permitting the libellant to sue in his own district, which is usually more convenient for him and equally convenient for the Government. On the other hand, it may frequently be more convenient for the libellant to have the suit brought where the vessel is, if the officers and crew of the vessel happen to be important witnesses in the case, particularly if the vessel is one which is making short voyages, so that the witneses will be available to appear at the trial. After giving these alternatives, Congress then provided, out of an abundance of caution, that the cause might be transferred to any other district, in the discretion of the Court, on the application of either party.

The important point to be borne in mind, in this connection, is that there can be no possible reason, in proceedings under the Act, for distinguishing between the enforcement of rights *in rem* and rights *in personam*, since the vessel can, in no event, be attached. Accordingly, the fundamental reason which makes it necessary to bring proceedings *in rem* against privately owned vessels in the districts where they can be found, is wholly absent in proceedings under the Act, and cannot be presumed to have influenced the mind of Congress.

The same argument which the Government made in this case in the court below, with respect

to the venue provisions of Section 2 of the Act, was fully considered and rejected by Circuit Judge Mack, in the Southern District of New York in the case of *Herman W. Alsberg* v. *United States* (unreported, opinion annexed hereto as Appendix B.: Sept. 15, 1922, D. C. S. D. N. Y.). In that case a libel was filed in the Southern District of New York, the district of libellant's residence, against the United States *in personam* under the Suits in Admiralty Act to enforce a solely *in rem* liability of a United States vessel. At the time the suit was commenced the vessel was not within the Southern District of New York but was within the territorial limits of the United States. The United States excepted to the libel because it did not allege that the vessel was within the Southern District of New York. The Court overruled the exception on the ground that as the vessel was within the territorial limits of the United States, the libellant had an election to sue either in the district of his residence or in the district where the vessel was. The Court said:

> "2. The question in these cases is whether, under this Act, a proceeding in admiralty may be brought against the Government in a District other than that in which the vessel is found, under circumstances under which the vessel, if privately owned, would be liable *in rem* though the owner would not be liable *in personam*."
>
> * * * * *
>
> "But if, at the time the proceeding under the Act is brought, the vessel is anywhere within the jurisdiction of the United States, so that, if privately owned, a proceeding in admiralty would be maintainable against it in some District Court, I can see no reason for interpreting the clear

language of the Act so as to limit the venue in a suit against the United States to the District Court of the jurisdiction in which the vessel may then be found.

"The very unusual provisions in the Act for a transfer of the case to any District within the country that the Court may deem proper, is to my mind a clear indication that the venue provisions are to be most liberally and not most strictly construed.

"Even if as a matter of comity I did not feel bound to follow the decision of Judge Hand overruling a similar exception in the case of the *Eagle Oil Transport Co.* v. *U. S.*, October 28, 1921, I shou'd independently reach the same conclusion."

CONCLUSION.

It is respectfully submitted that, as the Court below had jurisdiction, its decree should be reversed with costs.

Dated November 10th, 1922.

D. ROGER ENGLAR,
JAMES W. RYAN,
J. EDWARD TYLER, JR.,
Counsel for Appellant.

Appendix A.

No. 16,498.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA IN ADMIRALTY.

A. MARION SMITH,

—against—

UNITED STATES OF AMERICA

This is a libel by a seaman for wages, transportation from Buenos Aires to the United States and damages. The proceeding is in the nature of an action *in rem* against the vessel but is brought *in personam* against the United States under the provisions of Section 2 of the Act of Mar. 9, 1920, 41 S. 525.

It appears that on June 28, 1919, libellant shipped at New Orleans as wireless operator on the American merchant ship "Nawitca," for a voyage to Liverpool, via Buenos Aires and other ports, and back to a port of discharge in the United States, for a term not exceeding six months, at a wage of $110 per month.

After various delays, mainly due to defective boilers, the vessel arrived at Buenos Aires on September 10, 1919, and remained there until after December 29th, 1919, when his six months term expired.

Libellant claims wages at $125 per month, alleging that the wages of all shipping board employees had been raised. Under his contract he was entitled to $660 less $321.45, consisting of port payments of wages and slop chest charges. Under the contract he had due him $388.55. This amount the master offered to pay him but he refused to accept it, claiming transportation back to the United States and one month's extra pay for discharge in a foreign port.

Prior to June 3, 1919, the "Nawitca" was owned by the United States Shipping Board, and on that day she was sold with other vessels to the Nacirema S. S. Corporation, and delivered at New Orleans on June 9th, 1919. $125 was paid on account and a mortgage retained for the balance. On May 21, 1920, by agreement with the U. S. Shipping Board, the "Nawitca" was transferred by the Nacirema Company to the Brooks S. S. Corporation, that company assuming the balance of the purchase price, and a mortgage was executed. On July 29, 1920, the U. S. Shipping Board reacquired the "Nawitca" by agreement with the Nacirema S. S. Corporation and the Brooks S. S. Corporation.

It is apparent from the above stated facts that during the term of libellant's employment the "Nawitca" was not owned by the U. S. Shipping Board. Nevertheless, under the admiralty law, libellant has a lien on the vessel in the hands of her present owners, the U. S. Shipping Board for any wages lawfully due. This would not be affected by the mortgage presumably under which the Shipping Board reacquired her. Wages are preserved as a preferred maritime lien superior to a mortgage. Subsection M. Ship Mortgage Act,

Section 30, Act June 5, 1920, ch. 250, 41 S 1000.

The defendant raises the question of jurisdiction. It is argued that there is no jurisdiction in any U. S. District Court unless the vessel is within the reach of the process of the Court, or at least within the territorial limits of the United States, as otherwise no Court in the United States would have jurisdiction *in rem;* that the vessel having changed owners after the claim for wages accrued, there could be no action *in personam* against the present owner if the vessel was owned by private parties. To support this the case *Blamberg Bros.* v. *U. S.*, 272 F. 978 is relied on. Considering the learning and experience of Judge Rose this decision is undoubtedly entitled to great weight, but I am constrained to hold differently.

The Act of March 9, 1920 contains no restriction in terms such as imposed by the decision in *Blamberg Bros.* v. *U. S., supra.* In fact, considering the divisions of Section 7, Congress seems to take the position that a vessel owned by the United States Shipping Board can not be seized *in rem* in any country. It was certainly never the intention of Congress to deprive a seaman of any of his rights guaranteed by the admiralty law. Those rights have been extended by legislation from time to time rather than restricted. I think the statute should be given the broadest interpretation.

Coming now to the merits of the case, libellant is clearly not entitled to anything more than the master offered to pay him. At the time the wages accrued the vessel was not in the possession of the Shipping Board, and therefore any agreement made by that corporation with regard to wages generally would have no application. He was not improperly discharged in a foreign port. His

contract had expired and he could elect to accept his discharge, which he did, or he might have continued with the vessel until she reached an American port. Furthermore, it cost him nothing to return to the United States.

There will be judgment in favor of libellant in the sum of $338.55 with interest at five per cent. from judicial demand, costs of Court to be paid by respondent.

August 4, 1922.

(Signed) RUFUS E. FOSTER,
Judge.

Appendix B.

IN THE
UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HERMAN W. ALSBERG,

—against—

UNITED STATES OF AMERICA.

MEMORANDUM OPINION.

MACK, *Circuit Judge*:

1. In the light of the decision of the Supreme Court in *U. S.* v. *Pfitsch*, June 1, 1921, it would seem that the Suits in Admiralty Act of March

9, 1920, gave exclusive jurisdiction to the District Courts of the United States of proceedings against the United States as owner of a merchant vessel directly or through a corporation in which it owned the entire stock, in those circumstances in which, if such vessel were privately owned, an admiralty proceeding could be maintained.

2. The question in these cases is whether, under this Act, a proceeding in admiralty may be brought against the Government in a district other than that in which the vessel is found, under circumstances under which the vessel, if privately owned, would be liable *in rem* though the owner would not be liable *in personam*.

Judge Rose, in *Blamberg Bros.* v. *U. S.*, 272 Fed., 978, has held, and in my judgment correctly, that if at the time the proceeding is brought the vessel is not within any jurisdiction in the United States the libel is not maintainable. The reason is not that the vessel is free from liability, but that when neither a privately owned vessel nor its owner could be sued in any Court of the United States, the Act should not be construed, in the absence of express provision, to subject the United States to suit, under similar circumstances.

But if, at the time the proceeding under the Act is brought, the vessel is anywhere within the jurisdiction of the United States, so that, if privately owned, a proceeding in admiralty would be maintainable against it in some District Court, I can see no reason for interpreting the clear language of the Act so as to limit the venue in a suit against the United States to

the District Court of the jurisdiction in which the vessel may then be found.

The very unusual provisions in the Act for a transfer of the case to any District within the country that the Court may deem proper, is to my mind a clear indication that the venue provisions are to be most liberally and not most strictly construed.

Even if as a matter of comity I did not feel bound to follow the decision of Judge Hand overruling a similar exception in the case of the *Eagle Oil Transport Co.* v. *U. S.*, October 28, 1921, I should independently reach the same conclusion.

Exceptions overruled.

U. S. Circuit Judge.

September 15, 1922.

Appendix C.

IN THE
DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
SITTING IN ADMIRALTY.

PHOENIX PAINT & VARNISH COMPANY,

—against—

UNITED STATES OF AMERICA, owner of the American Steamships "ANNA E. MORSE," "COLIN H. LIVINGSTONE," "JENNIE R. MORSE," "E. A. MORSE," "H. F. MORSE."
(Five separate actions.)

SUR EXCEPTIONS TO LIBEL.

DICKINSON, *D. J.*:

The libel is for supplies furnished to a vessel. The vessel is the property of the United States. Every line of thought which the mind can follow has a beginning.

We begin with the proposition that no cause of action, however, good in itself, can be enforced either *in personam* against the United States or *in rem* against its property, except as the United States, acting through the Congress, has consented may be done. It is unnecessary to establish this as a proposition of law because the parties admit it. The inquiry has only an

academic value. Whether this immunity flows from the dignity of the sovereign, and because the respondent is clothed in the royal purple, or whether it follows a principle of judicial policy that Courts will enter no judgments which they cannot enforce, and as all the power of this Court to enforce its judgments is supplied by the respondent, it follows that we are powerless to enforce an order upon this respondent to do anything which it is unwilling to voluntarily do.

The next step in our logic is a forced one. We are driven to look for a statutory consent. It is found, if at all, in the Act of Congress, March 9th, 1920. That Act in effect declares that when there is a cause of action of this general nature which, under the law, could be enforced against a private person or against property owned by such person, it may be enforced against the United States with this difference. The Act assumes that a cause of action may be such that if a private person were the respondent it might be enforced by process *in personam* or *in rem*. In such a case it shall not be enforced *in rem* against property of the United States, but may be enforced against the United States *in personam*, but shall be enforced as if it were in process *in rem*, and that the process may issue from any Court within whose territorial jurisdiction the libellant resides or a Court within whose like jurisdiction the *rem* may be. The libellant resides within this District, and the proceedings are on their face at least, in accordance with the Act of Congress.

The present stage in the proceedings which we have reached is in substance a motion to

dismiss for want of jurisdiction. The basis of the exceptions taken to the libel, as we grasp the thought back of them, can be best presented by a citation of the case of *Blamberg Bros.* v. *United States,* 272 Fed. Rep. 978, upon which the respondent relies. That case, however, is not in point. It was ruled upon the proposition that the Act of Congress gave no permission to proceed unless the libel be one which could be sustained if it were against a private person or the property of a private person. The libel there could not have been so sustained, and what would follow the ergo is too obvious to require statement.

In the case at bar the libel could be maintained as against a private individual unless it failed because a good defence was interposed. It follows that we cannot dispose of the motion to dismiss without deciding the cause, and this we cannot do at the present stage of the proceedings.

The defence which we are asked to uphold is, if we have caught the thought, that the United States did not contract the debt. We will not now anticipate the findings which properly follow the trial by now finding whether the fact averred should be found to be the fact, nor whether this mere fact, if found, constitutes a defense.

The libellant relies upon the case of *Middleton & Co.* v. *United States,* 273 Fed. Rep. 199. We do not see that this case is in point either. It was there ruled that as the libellant was a resident of no District and as the *rem* could not be located, the libel might be filed in any District or the libellant was without remedy. This

ruling may or may not be open to the criticism directed against it that the question was whether Congress had authorized the proceedings brought to be brought against the United States. If consent to bring the proceeding which was brought in that case had not been given, the omitted consent was not supplied by a finding that the libellant there was without remedy. The being without remedy to enforce a meritorious claim is always a hardship, but the remedy is to supply the omission, not to assume it to exist when in fact it does not. Such a principle would subject the United States to judicial process in every case in which the libellant was otherwise without a remedy, and in that case resulted in giving to the libellant whose case was omitted from the Act a broader right and a greater privilege than was given to those who were clearly within the Act. It does not do to say that the right to sue would doubtless have been given had Congress had cases of that particular kind in mind. Congress has the undoubted power and duty to say not only in what kind of cases the United States may be sued, but also to say in what Court the suit may be brought.

In the case at bar the Act of Congress not only confers jurisdiction upon the District Courts but has also declared the proper venue by designating this Court as the Court to try this case if the libellant elects to file the libel here. It would be a shirking of the duty which Congress has imposed upon this Court to refuse to entertain the cause.

The exceptions are dismissed.

November 17, 1921.

Appendix D.

SUITS IN ADMIRALTY ACT.

[PUBLIC—NO. 156—66TH CONGRESS.]
[S. 3076.]

An Act Authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for libel *in personam*, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein

provided for, a libel *in personam* may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. [Such suits shall be brought in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found.] The libellant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel *in rem* or *in personam* in any district, a cross-libel *in personam* may be filed or a setoff claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the Court, be transferred to any other District Court of the United States.

SEC. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied,

or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the Court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libellant so elects in his libel the suit may proceed in accordance with the principles of libels *in rem* wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel *in rem* might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and cancelled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in Section 8 of this Act.

SEC 4. That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such

corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libellant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act.

SEC. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises.

SEC. 6. That the United States or such corporations shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

SEC. 7. That if any vessel or cargo within the purview of Sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any Court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such vessel, or the possession,

carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States Consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said Court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any suit, certified by the Clerk of the Court and authenticated by the certificate and seal of the United States Consul claiming such vessel or cargo, or his successor, and by the certificate

of the Secretary of State as to the official capacity of such Consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: *Provided, however,* That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case.

SEC. 8. That any final judgment rendered in any suit herein authorized, and any final judgment within the purview of Sections 4 and 7 of this Act, and any arbitration award or settlement had and agreed to under the provisions of Section 9 of this Act, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement.

SEC 9. That the Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation, having control of the possession or operation of any merchant vessel are, and each hereby is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of Sections 2, 4, 7, and 10 of this Act.

SEC. 10. That the United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such corporation, having control of the possession or operation of such vessel.

SEC. 11. That all moneys recovered in any suit brought by the United States on any cause of action arising from, or in connection with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage or ownership of any cargo, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such aforesaid corporation, having control of the vessel or cargo with respect to which such cause of action arises, for reimbursement of the appropriation, or insurance fund, or other funds, from which the loss, damage, or compensation for which said judgment was recovered has been or will be paid.

SEC. 12. That the Attorney General shall report to the Congress at each session thereof the suits under this Act in which final judgment shall have been rendered for or against the

United States and such aforesaid corporation and the Secretary of any department of the Government of the United States, and the United States Shipping Board, and the board of trustees of any such aforesaid corporation, shall likewise report the arbitration awards or settlements of claims which shall have been agreed to since the previous session, and in which the time to appeal shall have expired or have been waived.

SEC. 13. That the provisions of all other Acts inconsistent herewith are hereby repealed.

Approved, March 9, 1920.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922—No. 165.

BLAMBERG BROTHERS,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT.

Statement.

Counsel for the United States having obtained leave to file a supplemental brief in the case of *United States* v. *Carver* (No. 402), this appellant asked and was granted the privilege of filing a supplemental brief within three days after the filing of the Government's supplemental brief in the *Carver* case.

The Government's reply brief in the *Carver* case sets forth three possible interpretations of the Suits in Admiralty Act, which we will discuss in the order in which they appear in the Government's reply brief.

POINTS.

I.

The first construction suggested by the Government does violence to the language of the Act under discussion. It gives no effect to the words "in view of the provision herein made for libel *in personam*." These words clearly show that the remedy provided in the second section of the Act was to be co-extensive with the rights of which suitors were deprived by the first section of the Act. In view of these words it is impossible to construe the Act as leaving claimants without remedy in cases where their sole right, if the vessel were privately owned, would have been *in rem*.

The Government's suggested construction is equally inconsistent with the language of Mr. Campbell, before the Senate Committee on Commerce, quoted on page 3 of the Government's brief. After illustrating his remarks by mentioning the case of a ship which is in collision while in charge of a compulsory pilot, Mr. Campbell said:

> "While I am prohibiting actions *in rem*, I am giving the litigants exactly the same rights as if they had proceeded *in rem*."

The liability of a vessel and the non-liability of her owners, for damage done while the vessel is in charge of a compulsory pilot, has been clearly explained by this Court. *The China*, 7 Wallace (U. S.) 53; *Homer Ramsdell Transportation Co.* v. *La Compagnie Generale Transatlantique*, 182 U. S. 406. When considered in con-

nection with these cases, Mr. Campbell's remarks afford the clearest possible evidence that he understood the Act under discussion as affording a remedy for claims which were solely *in rem* as well as for claims which could be enforced either *in rem* or *in personam* at the option of the claimant.

Since the argument of this case the Circuit Court of Appeals for the Third Circuit has affirmed the decision of Judge Dickinson in the case of *United States* v. *Phoenix Paint & Varnish Company*, referred to in this appellant's principal brief (pages 11, 12, 43). We take the liberty of printing the opinion of the Circuit Court of Appeals as an appendix to this brief, as it seems to us squarely contrary to the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Cunard Steamship Company* v. *United States*, which is printed as an appendix to the principal brief for the Government in the present case. We call the Court's attention to the fact that in the *Phoenix Paint & Varnish Company* case the suits were instituted by libels *in personam* and prosecuted as if *in rem*. Neither in the opinion of the District Court, nor in the opinion of the Circuit Court of Appeals does it appear where the vessels were, against which the liens were asserted, or even that they were still in existence.

II.

The Government's argument in opposition to the second construction considered in its brief, is based entirely on certain inconveniences to which, it is suggested, the Government might be subjected under this construction. The principal

point made in this connection is that a private owner, who is not personally liable, need not have recourse to the Limitation Statute, but may simply abandon his vessel to the lienors. Although this is doubtless true, we think it is unimportant. Under the Limitation Act of 1851, the rights of the shipowner and the damage claimants are fixed as of the end of the voyage on which the damage occurred. At this point the Government has precisely the same rights as a private owner. At this time the owner has in his possession the precise value which he is required to surrender. Subsequent fluctuations in the value of the vessel, while they may be of great practical importance, cannot give rise to any real difference in principle between the liability of the Government and the liability of a private owner. At the end of a voyage on which damage has occurred, the Government may limit its liability. If suit is promptly brought against the vessel, limitation may be had under the Act of 1851; if suit is not brought promptly, the Government may secure a practical limitation by converting its interest in the vessel into cash and holding this sum as security for future claims. If it chooses to continue to own and operate the vessel, her subsequent decline in value merely represents the fruit of an unfortunate investment, and has no necessary or logical connection with the extent of the owner's liability on a previous voyage. From the standpoint of natural justice, there is certainly no inequity in making an owner responsible to the extent of the value which he pledges, or permits others to pledge, for the prosecution of a particular voyage.

So far as the Government relies upon the bare fact that the position of the Government under

the suits in Admiralty Act may, in certain events, be less favorable than that of a private owner, we think the answer is that this disadvantage is a necessary concomitant of the corresponding advantage secured to the Government under the Act. In the case of a private owner, the lienor may secure himself against any decline in the value of the vessel by having her attached and sold (or bonded) at the end of the voyage on which his claim arose. Under the suits in Admiralty Act, the lienor is deprived of this remedy in the case of Government ships. It is, therefore, to be expected that the protection which the lienor can no longer secure for himself will be afforded to him by the terms of the act; and this we contend is the effect of the Act as properly construed. The Act gives the Government the right to continue the operation of its vessels without interference by lienors; but any subsequent decline in the value of the vessel is for the account of the owner and does not concern the lienors, who have been deprived of their right to have the value of the vessel converted into cash or have security presently given for the amount of this value.

The foregoing construction of the act is supported by the examples given in the Government's reply brief. It is incredible that a vessel worth One Million dollars would be permitted, under private ownership, to continue in operation after valid maritime liens had been incurred in excess of her value. Such a result is only possible where the vessel is exempt from seizure and lienors have no power to enforce their claims against her.

Counsel for the Government also comment on certain inconveniences arising out of the lack of uniformity in the limitation laws of the various

maritime countries. This inconvenience exists in the case of private shipowners as well as in the case of Government vessels. The differences in the limitation laws of different countries, and the different situations which may arise under them, afford an endless field for discussion and argument. We feel, however, that such argument would be inappropriate in this case, in view of the fact that the entire subject matter of limitation has only a collateral bearing on the interpretation of the Suits in Admiralty Act; and we think that counsel for the Government have already pursued this line of argument to a point where its bearing on the issues involved in the present case is very remote.

III.

The third interpretation of the Suits in Admiralty Act suggested by the Government is interesting, but is admittedly unsupported by the language of the Act. Counsel for this appellant assume that this Court will not, either in the present case or in the *Carver* case, find it necessary to determine to what extent and in what manner the Government may limit its liability under the Suits in Admiralty Act. No question of limitation is involved in either of these pending cases and we, therefore, do not feel at liberty to argue the various questions of limitation suggested in the Government's brief. The question of limitation of liability comes into the present case only as bearing on the application of the suits in Admiralty Act to claims for which the Government would not be liable *in personam* if it were a private owner. Confining ourselves to this aspect of the case, we will only point out

that while the Government's third suggested interpretation is less inconsistent with the language of the suits in Admiralty Act than the interpretation first suggested, it produces a result which is highly unjust to lienors, for the reasons set forth in our discussion of the Government's second suggested interpretation. We respectfully submit that the second interpretation suggested by the Government is the only natural and logical interpretation of the Act, and that this interpretation does not produce any absurdity or injustice (in the matter of Limitation of Liability, or otherwise) which should lead to its rejection.

December 12, 1922.

Respectfully submitted,

D. ROGER ENGLAR,
T. CATESBY JONES,
JAMES W. RYAN,
J. EDWARD TYLER, JR.,
Counsel for Appellant.

Appendix.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

UNITED STATES OF AMERICA, Owner of the Steamship "ANNA E. MORSE",
Respondent-Appellant,

—against—

NORRIS E. HENDERSON, JOHN D. BOYCE and WILLIAM W. HODGSON, trading as PHOENIX PAINT & VARNISH COMPANY,
Libellants-Appellees.

No. 2865. October Term, 1922.

UNITED STATES OF AMERICA, Owner of the Steamship "COLIN H. LIVINGSTONE",
Respondent-Appellant,

—against—

NORRIS E. HENDERSON, JOHN D. BOYCE and WILLIAM W. HODGSON, trading as PHOENIX PAINT & VARNISH COMPANY,
Libellants-Appellees.

No. 2866. October Term, 1922.

UNITED STATES OF AMERICA, Owner of the Steamship "JENNIE R. MORSE",
Respondent-Appellant,

—against—

NORRIS E. HENDERSON, JOHN D. BOYCE and WILLIAM W. HODGSON, trading as PHOENIX PAINT & VARNISH COMPANY,
Libellants-Appellees.

No. 2867. October Term, 1922.

UNITED STATES OF AMERICA, Owner of the Steamship "E. A. MORSE",
Respondent-Appellant,

—against—

NORRIS E. HENDERSON, JOHN D. BOYCE and WILLIAM W. HODGSON, trading as PHOENIX PAINT & VARNISH COMPANY,
Libellants-Appellees.

No. 2868. October Term, 1922.

UNITED STATES OF AMERICA, Owner of the Steamship "H. F. MORSE",
Respondent-Appellant,

—against—

NORRIS E. HENDERSON, JOHN D. BOYCE and WILLIAM W. HODGSON, trading as PHOENIX PAINT & VARNISH COMPANY,
Libellants-Appellees.

No. 2869. October Term, 1922.

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Before:—BUFFINGTON, WOOLLEY and DAVIS, *Circuit Judges*.

WOOLLEY, *Circuit Judge*:

These actions were brought by the Phoenix Paint and Varnish Company, a co-partnership, against the United States of America, as owner of the several ships named in the caption, for supplies furnished them while being operated by the United States Transport Co., Inc. They were instituted by libels *in personam* and prosecuted, as if *in rem*, in the manner provided by the Suits in Admiralty Act of March 9, 1920, 41 Stat., Chapter 95, page 525, exempting vessels owned by the United States and its agencies from seizure in admiralty causes. As they arose out of the same facts and involve the same questions of law we shall dispose of them in one opinion.

The actions were founded on the Act of June 23, 1920 (36 Stat., Chapter 373, page 604, Comp.

St. 1913, Sec. 7783-7787), as re-enacted in the Merchant Marine Act of June 5, 1920, 41 Stat., page 988, Chapter 250, Sec. 30, Sub-sections P, Q, R, S and T. At the trial the libellants introduced evidence that they had furnished supplies to five ships owned by the United States and in the operation of the United States Transport Company, and maintained that the United States Transport Company was, within the terms of the statute, the "person to whom the management of the (vessels) at the port of supply (had been) entrusted" and as such was "presumed to have authority from the owner to procure" supplies and necessaries. *The Yankee,* 233 Fed. 919; *The Penn,* 273 Fed. 990. In defense, the United States introduced a number of contracts of confusing details covering the building of the ships by the Virginia Shipbuilding Corporation, the financing of their construction by the United States Shipping Board Emergency Fleet Corporation the adjustment of disputes, conveyance of title of the ships to the United States of America, delivery thereafter to the United States Transport Company for operation pending a proposed sale to the Shipbuilding Corporation, on which it (the United States) based the contention, not exactly that it was not the owner of the ships for which the supplies had been furnished, for the title papers were against this position, but that the Transport Company was operating the ships not for it but for the Virginia Shipbuilding Corporation. The issue was so framed that, on facts to be mentioned presently, a finding that the ships were operated for the United States would sustain the libels, or a finding that they were operated for the Virginia Shipbuilding Corporation would defeat the libels. The District Court found against the United States and

entered decrees for the libellants. The cases are here on the respondent's appeals.

In reviewing the complicated facts of these cases it should be understood that they are not actions between the United States, the United States Shipping Board Emergency Fleet Corporation, the United States Shipping Board, the Virginia Shipbuilding Corporation, the United States Transport Co., Inc., or any of them, arising out of contracts for building ships and advancing money. They are simple actions in admiralty brought against the United States by one furnishing its ships with supplies. Also, it should be noted that the libellants at the time they furnished the supplies were wholly uninformed of the situation between the United States and its several agencies. They came on the scene as strangers. Still another matter of importance is to determine at what point in this complicated controversy we should enter in order to find and follow the issue raised by the libellants. The proctors for the United States began at the first historical stage of the transactions between the Emergency Fleet Corporation and the Virginia Shipbuilding Corporation and followed them down into and through the litigation. This chronological order perhaps has advantages, but it tends to add to the confusion by placing the libellants in company with a group of corporations at a time and under circumstances with which they had nothing to do. Therefore, having in mind that the libellants brought these suits in admiralty under a statute enacted specially for the protection of persons in their situation, we think the place at which to start is where the libellants started and where also the law starts.

The libellants began by furnishing supplies, concededly necessaries, to five ships in the opera-

tion of the United States Transport Company, upon its order, made with authority from the owner, presumed by statute, to procure the supplies on the credit of the ships. It cannot be questioned that, upon the face of this transaction so far as it has been stated, the libellants had a right to assume that the Transport Company was the person to whose management, within the terms of the statute, the ships had been entrusted at the port of supply, and that, as such, it was clothed with authority by the owner to procure supplies, under a presumption which the law, in its modern policy, makes in favor of the person furnishing them. But the law goes farther and provides that, notwithstanding this liberal provision for one furnishing supplies, it shall not "be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor." Thus, speaking broadly, the law presumes the owner's authority in one entrusted with a ship to procure supplies on the pledge of the ship, unless the owner has withheld his authority and the furnisher knew it or by diligence could have ascertained it. *The Havana*, 63 Fed. 496; *The Yankee*, 233 Fed. 919; *The Oceana*, 244 Fed. 80; Certiorari denied, see *Morse Dry Dock & Repair Co.* v. *Conron Co.*, 245 U. S. 656; *The Dana*, 271 Fed. 356; *Northwestern* v. *Dunkley*, 174 Fed. 121; *The Valencia*, 165 U. S. 264; *The Kate*, 164 U. S. 458; *The Huron*, 271 Fed. 781. The exception to the remedy which the law affords one furnishing supplies is operative only when by reason of some circumstance he either knew or by diligence could have ascertained that the person ordering the

supplies was without the authority of the owner which otherwise the law presumes. The United States urges, quite correctly we think, there is in these cases one such circumstance which, at the threshold, imposed upon the libellants the duty of inquiry. It was a letter dated March 30, 1920, written by the Transport Company to the libellants, out of which grew the order for supplies. The material parts are as follows:

> "We desire to know whether you wish to furnish us with list prices of paint for vessels under our operation. Part of this fleet are U. S. Shipping Board vessels and part belonging directly to this Company. Upon the vessels belonging to the Shipping Board, payment for their bills will be prompt, that is, within approximately ten to fifteen days: upon vessels owned directly by us it will be slower, credit of possibly sixty days in some cases."

Clearly this was notice to the libellants diligently to ascertain whether the Transport Company, "because of a charter party, agreement for sale of the vessel, or for any other reason, was without authority to bind the (vessels)" of the United States Shipping Board for the supplies it was about to order. The libellants made no such inquiry. This was a mistake. But the matter can not stop here for the next question is, what would they have found if they had inquired? This: They would have found a contract between the United States of America, "represented by the United States Shipping Board Emergency Fleet Corporation" on the one part, and the United States Transport Co., Inc., on the other part, bearing date the thirteenth day of March, 1920, and known as agency contract MO3. This contract was entered into only a few days before the quoted letter from the Transport Company

putting the libellants on inquiry. If they had read it, the libellants would have found that therein the United States described itself as "owner of certain vessels" and the Transport Company as "managing agent;" that the Fleet Corporation appointed the Transport Company "its agent for the management, operating, and conduct of the business of such vessels as it has assigned and may assign to" it; that the Transport Company, "The Agent," agreed to provide and pay for all provisions, equipment and supplies, perform all customary duties of a managing and operating owner of the vessels, collect all freights and moneys arising out of their management and operation and deposit the same on behalf of the Emergency Fleet Corporation as a separate trust fund in the name of that corporation; and that the Transport Company "shall be paid an agent's fee, and a commission, as stated."

In searching this contract for lack of authority on the part of the Transport Company to procure supplies on the credit of ships assigned to it, the libellants would have found no provision whereby the United States, as owner, had withheld authority from the Transport Company to procure supplies for the ships it had entrusted to its management. Therefore, at this stage the Transport Company remained vested with authority presumed by the law to order supplies upon the credit of the ships, Act of June 5, 1920, Sec. 30, Sub-sections Q and R, 41 Stat. 1005; *The South Coast*, 251 U. S. 319; *The Bronx*, 246 Fed. 809; *The Dana*, 271 Fed. 356; and the libellants had a right to furnish the supplies upon the credit of the ships—if the ships for which the supplies were furnished were actually of the number assigned, or to be assigned, under the contract. In identifying the ships in question

with those of the contract of agency the libellants, had they inquired, would have found that the Transport Company had received the five ships here in litigation and in return had given the Emergency Fleet Corporation "delivery receipts," indicating that it had received the several ships and had entered them "under the terms and conditions of the Agency Agreement for Managing and Operating Steel Cargo Vessels * * * (pending purchase) * * *, said agreement having been executed March 13, 1920." But these receipts did more than identify the ships as of the number embraced within the MO3 agency contract. It told them that the ships were accepted by the Transport Company for operation "pending purchase." What purchase? Here, obviously, was another circumstance which imposed upon the libellants the duty under the statute to examine farther into the Transport Company's authority to bind the ships or hold the owner for supplies. This the libellants failed to do; but if they had done it, what would they have found? They would have found a confusion of transactions involving war shipbuilding and financing. These transactions we shall give only in outline, bringing into view only such parts as bear on the title of the ships here in question. They are these:

During the war the United States Shipping Board Emergency Fleet Corporation entered into a contract with the Virginia Shipbuilding Corporation for the construction of twelve ships by the latter concern mainly with moneys to be advanced by the former. The end of the war found the ships in various stages of incompletion and the Shipbuilding Corporation indebted to the Fleet Corporation in something over $12,000,000. With the need of more money with which to complete the ships, arrangements were entered into

whereby the Fleet Corporation promised to make further advance. This is where the trouble began.

These re-financing transactions were covered by two contracts. The first, bearing date September 25, 1919, was between the Virginia Shipbuilding Corporation and the United States Shipping Board Emergency Fleet Corporation and the United States Shipping Board, the latter two parties "representing the United States of America." This agreement is entitled "Adjustment Agreement to be attached to contract No. 145 SC," the original contract for the construction of the ships. As the original contract is not in the record we assume it would have given the libellants no information if they had examined it. If, however, they had examined the Adjustment Agreement of September 25, 1919, they would have found that the Shipbuilding Corporation, under its original contract, had been and still was engaged in constructing ships for the Fleet Corporation; that it needed money with which to complete them and demanded money in adjustment of certain differences arising out of the original contract; that to this end a sum was allowed by the Fleet Corporation and accepted by the Shipbuilding Corporation; that to pay off its indebtedness to the Fleet Corporation the Shipbuilding Corporation agreed to purchase and the United States Shipping Board *to sell* three ships then completed and five ships then under construction at the price of $225 per D.W.T. less certain credits, net earnings of the ships when put in commission to be applied to payment on the purchase price; and that when the "closing dates" arrive, the parties *would enter* into contracts *of sale*, the terms of which "shall be the same as under the present Standard Form of Purchase Agreement and Mortgage adopted by the Shipping Board."

This reference to the standard form of purchase agreement adopted by the Shipping Board as the terms of the proposed contracts of sale ultimately to be entered into under the agreement of September 25, 1919, might, perhaps, have been notice to the libellants to travel still farther into the transactions between these several governmental agencies and ascertain if there were anything there affecting their right to furnish supplies on the credit of the ships. If they had procured a copy of this standard form of purchase agreement and had examined it they would have discovered that it contained the very thing which, if acted upon, would have annulled their right to libel the ships for supplies, or to proceed, as in these cases, against the owner *in personam*. This is a provision in the standard form of agreement, being Section 6, Sub-section f, which reads as follows:

> "From the time of delivery by the seller of the bill of sale of said vessel, and until the payment in full of the notes to be given the buyer, and until the performance of all other obligations of the buyer hereunder, the buyer agrees * * *, that the buyer's right, title and interest in said vessel is subject to said mortgage and to this agreement, and that the buyer has no right, power or authority to suffer or permit to be imposed on or against said vessel any liens or claims which might be deemed superior to, or a charge against, the interest of the seller in said vessel."

On this undertaking by a buyer of a ship, after receiving bill of sale, to protect the mortgage on the ship against superior liens mainly rests the case of the United States. It contends that here the owner clearly withheld authority from the agent to bind the ships for supplies. But the

trouble with this contention is that the cited provision in the standard form of purchase agreement never became operative because the Shipping Board and the Virginia Shipbuilding Corporation never executed agreements containing such provisions, that is, the Shipping Board has not sold the ships to the Shipbuilding Corporation, and, in consequence, has not given it bills of sale, and the Shipbuilding Corporation has not paid for or acquired the ships under this or any form of agreement of purchase. Therefore, if the libellants, in running down the history of the ships, had encountered this standard form of purchase agreement it would, unsigned, have told them nothing to defeat their remedy under the statute.

There remains another paper in the case, being the second re-financing contract, bearing date July 19, 1920, between the Virginia Shipbuilding Corporation of the one part and the United States Shipping Board Emergency Fleet Corporation and the United States Shipping Board, representing the United States of America, of the other part. Without repeating the matters which moved the parties, this agreement provides *inter alia* that the Shipbuilding Corporation shall reconvey unto the United States of America the Steamships "Vanada" and "H. F. Morse" (the latter being one of the ships here in question) and that the title to hulls 1, 2, 5, 6, 7, 9 and 10 (in which are included four of the ships here in question) are thereby transferred and conveyed to the United States of America. Provision was made for the use of net ship revenues in the completion of the remaining hulls pending their contemplated purchase.

If the libellants had examined the contract of July 19, 1920, they would have found that the

title to the "H. F. Morse" was to be conveyed to the United States of America (which was done on September 22, 1920), and that by the agreement itself the title of each of the four remaining ships was conveyed to the United States of America, and that, so far as is shown, there the title remained at the time the libellants brought these actions and still remains. In other words, these transactions, disentangled from details, would have disclosed to the libellants several things: First, title of the ships in the United States of America at the time it turned them over to the Transport Company for operation under the agency agreement MO3, at the time the supplies were furnished, and at the time these actions were brought; second, an outstanding executory contract to sell the ships to the Virginia Shipbuilding Corporation, clearly distinguished from a contract of sale, *White* v. *Treat*, 100 Fed. 290; *Hammer* v. *United States*, 249 Fed. 356; Third, that the Virginia Shipbuilding Corporation had not purchased the ships under the contract, and, for that matter, may never purchase them; and fourth, that there is no provision in any of the completed transactions withholding from the Transport Company authority to purchase supplies upon the credit of the ships. Hence there was nothing open to discovery by the libellants on inquiry which shows that the Transport Company, "the person ordering the * * * supplies * * * was without authority to bind the (vessels) therefor." It follows that the libellants can maintain their libels *in personam*.

The decrees below are affirmed.

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TABLE OF CASES.

STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

BLAMBERG BROTHERS, APPELLANT,
v.
UNITED STATES OF AMERICA, APPELLEE. } No. 165.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT OF FACTS.

The United States, through the Shipping Board, on July 26, 1920, sold an uncompleted hull, known as the barge *Catskill*, to the Guidera Towing and Transportation Company, upon the deferred payment plan (R. 6–8). The agreement of sale, substantially a bare-boat charter, required the purchaser-charterer to complete the hull, then to man and equip her, and to employ her for its account in its business. Title was to remain in the Government until the full purchase price was paid. The purchaser-charterer completed the barge, manned

and equipped her, and about August 6, 1920, carried a general cargo from the port of Baltimore to the port of Havana, Cuba. All bills of lading were issued by and in the name of the purchaser-charterer, who had the sole interest in all the contracts of affreightment. The purchaser paid the Government only the initial installment.

After the barge arrived at Havana, Cuba, seamen libeled her to recover wage claims stated at $3,725, and the barge was attached, taken into custody, and remained under attachment and in custody at Havana when libels for cargo losses on the Havana voyage, demanding damages aggregating $100,000, were filed upon in personam principles against the United States in the district courts of the United States for Maryland, Middle and Western Districts of Pennsylvania, and the Southern District of New York, under *assumed* authority of the suits in admiralty act, March 9, 1920. The barge then was worth less than $50,000. There can be no in personam liability of the Government as there was no privity of contract between the cargo owners and the Government.

The cargo libels, of which the present claim is one, proceed only upon *in personam* principles, without an election to have the libels proceed upon principles of liability *in rem*. They are all presented by the same group of proctors.

Blamberg Brothers is a corporation of Maryland, having its principal place of business in Baltimore, within the District of Maryland.

By leave of court, the Government filed a suggestion of want of jurisdiction (p. 10), stating these facts. It denied the libels could be maintained in any of the district courts, under authority of the suits in admiralty act, as the barge was under attachment and in custody in a foreign country, and without the jurisdiction of any district court.

The appellant now suggests the right to proceed under the suits in admiralty act solely because it has its principal place of business in Baltimore.

The district court, after hearing had upon the suggestion of want of jurisdiction and answer, denied jurisdiction. It held that if a private individual instead of the Government had been the owner of the barge, no action against the owner or the barge could have been maintained in any district court of the United States; relief, therefore, should have been sought in the jurisdiction—Cuba—where the barge physically was. Congress did not intend to make the United States suable under any circumstances in which a suit against the ship or her owner could not have been instituted in this country, were the ship privately owned. It did not intend to open the door of its courts, as against the United States, to suits for liabilities which could not have been prosecuted in the United States against an individual owner or his property. (272 Fed. 978.)

From a decree dismissing the libel, this appeal has been taken.

II.

THE SUITS IN ADMIRALTY ACT.

The pertinent provisions of the suits in admiralty act, March 9, 1920 (41 Stat. 525), by authority of which the libel is filed, may be thus paraphrased:

> Be it enacted * * * that *no vessel owned by* the United States * * * shall hereafter in view of the provisions herein made for a libel in personam *be subject to arrest or seizure by judicial process in the United States or its possessions.*
>
> SEC. 2. That in case where if *such vessel were privately owned* or operated * * * *a proceeding in admiralty could be maintained at the time of the commencement of the action* herein provided for, a libel in personam may be brought against the United States * * * provided that such vessel be employed as a merchant vessel * * *. Such suit shall be brought in the District Court of the United States for the district in which the parties so suing or any of them reside or have their principal place of business in the United States, *or in which the vessel or cargo charged with liability is found* * * *. In case the United States * * * shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed, *with the same force and effect* as if the libel had been *filed by a private party* * * *. Upon application of either party the cause may, in the discretion of the court, be transferred to any other District Court of the United States.

SEC. 3. *That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties.* * * * Decree shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. *If the libellant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained.* Election to so proceed shall not preclude the libellant in any proper case from seeking relief in personam in the same suit. * * *

SEC. 6. That the United States * * * shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners * * * of vessels.

SEC. 7. That if any vessel or cargo within the purview of sections 1 and 4 of this act is arrested, attached, or otherwise seized by process of any court in any country other than the United States * * * the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United

States, or the United States Shipping Board, or such corporation as by said court required for the release of such vessel or cargo and for the prosecution of any appeal * * *. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories, and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: *Provided, however,* That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case.

III.

HISTORY OF THE LEGISLATION

Section 9 of the original shipping act of 1916, approved September 7, 1916 (39 Stat. 728), provided:

> Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels *shall be subject to* all laws, regulations, and *liabilities* governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or interest therein. (Italics ours.)

This court in the *Lake Monroe* (250 U. S. 246) construed this section as subjecting vessels owned or operated by the Government in merchant service to arrest or seizure for the enforcement of maritime liens. In order to obviate delays and consequent losses through seizure of the vessels, and the expenses incident to providing surety bonds, certain bills were introduced in Congress, which eventually passed as the act entitled "Suits in admiralty act" of March 9, 1920 (41 Stat. 525), which declared the *immunity of* ships owned or possessed by the Government *from arrest or seizure by judicial process in the United States or its possessions*, and provided a proceeding in admiralty against the Government for the faults of such vessels, measured by the same liabilities, principles of law, and rules of practice as would exist or become applicable

if such vessels had been privately owned or operated. A marginal reference to the history of this litigation is made. [1]

The scope of the jurisdiction provided by the act has been seriously questioned. The legislative history indicates that it must be measured by and limited to the liabilities considered by section 9 of the original shipping act. As the facts, however, of the present case determine the action can not be

[1] The legislative history of the suits in admiralty act is summarized: The original bill, known as S. 2253, was introduced in the Senate on June 23, 1919, and referred to the Committee on Commerce (66th Congress, 1st sess., Cong. Rec. p. 5869). On July 9, 1919, the same bill was introduced in the House as H. R. 7124 and referred to the Committee on the Judiciary (Cong. Rec. 7538). On August 28, 1919, the Committee on Commerce of the Senate held hearings on S. 2253. See report of hearing before the Committee on Commerce, United States Senate, S. 2253, upon which the committee submitted its report (No. 223, 66th Congress, 1st sess.), by which it reported back a new bill, No. 3076 (Cong. Rec., p. 6017). This bill was debated in the Senate (Cong. Rec., pp. 7317, 7439, 7440), and passed the Senate and was referred to the House and by it referred to the Committee on the Judiciary (Cong. Rec., 7538). The Committee on the Judiciary of the House held hearings on H. R. 7124, serial No. 4, and also on a substitute bill known as the Attorney General's substitute, which hearings are fully reported by serial 8, dated November 13, 1919, of the House Committee on the Judiciary.

On December 12, 1919, the Committee on the Judiciary submitted to the House its report (House Report No. 497), reporting the bill in a different form (Cong. Rec., 66th Congress, 2nd sess., p. 498). This report was debated (Cong. Rec., pp. 1678–1693, 1750–1759). The bill went to conference and the conference report, amending the bill as passed by the House, was reported (Senate Document No. 233) to the Senate (Cong. Rec., p. 3350), and agreed to by the Senate (Cong. Rec., p. 3690, 3691). It was also submitted in the House as H. R. 669 (Cong. Rec., p 3629), agreed to by the House (Cong. Rec., p. 3631), examined and signed (Cong. Rec., pp. 3864–3883), approved by the President March 9, 1920 (Cong. Rec., pp. 3864–3883), approved by the President March 9, 1920 (Cong. Rec., p. 4068), and became Public Act No. 156 (41 Stat. 525).

The hearings before the Committee on Commerce in the Senate were printed as of Thursday, August 28, 1919, while the hearings before the Committee on the Judiciary of the House were printed, the first hearing being Serial 4, dated August 28, 1919, and the second hearing being known as Serial 8, dated November 13, 1919.

presented under any authority of the suits in admiralty act, and was properly dismissed upon sound jurisdictional grounds, a review of the legislation seems unnecessary.

IV.

ARGUMENT.

By section 1 of the act Congress has declared Government-owned vessels immune from arrest or seizure in the United States or its possessions, and by section 7 has provided the necessary authority for defending actions abroad, if the vessels there are subject to arrest and detention. For the liabilities of such vessels declared immune from seizure and arrest (within the United States) at the time the libel is filed, Congress by section 2 has provided a limited remedy to enforce the vessel's liability by proceedings against the Government directly.

The act intended to make the United States suable only under circumstances in which a suit could have been instituted in this country if the vessel were privately owned and such privately owned vessel then could have been proceeded against.

In any view, Congress did not intend to make the United States suable unless suit upon the liabilities asserted could have been instituted in this country, had the vessel been privately owned rather than Government owned, and a proceeding could have been maintained against the vessel or her private owner, having the same relation to such vessel as the Government had to the *Catskill*.

Section 3 provides:

> * * * shall proceed and shall be heard and determined according *to the principles of law and to the rules of practice obtaining in like cases between private parties.* (Italics ours.)

Section 2 provides:

> * * * where if such vessel *were privately owned* a proceeding in admiralty could be maintained at the time of the commencement of the action herein * * * a cross libel in porsonam may be filed * * * with the same force and effect as if the libel had been *filed by private parties.* (Italics ours.)

Section 3 provides:

> * * * If the libellant so elects in his libel, the suits *may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned or possessed a libel in rem might have been maintained.* (Italics ours.)

When the present libel was filed, the *Catskill*—operated by bare boat charterers for their account, not by the Government—was under attachment for crew's wages in Cuba. The *Catskill* was worth less than $50,000, and the cargo-damage claims, represented by the present group of proctors, asserted against the Government in four different United States district courts, totaled $100,000. It cannot be stated or estimated what additional claims exist against the barge, *in rem* liabilities, nor can it be

termined in what priority the claims against the rge would attach. It is doubtful if, under the vs of Cuba, cargo losses or damages for delay can asserted against the barge.

If the *Catskill* had been privately owned, a libel *in n* against her only could have been maintained in a reign jurisdiction—Cuba. No libel could have en filed against her owner anywhere. There was privity of contract between owner and libellant. If the *Catskill* had been privately owned, all claim-ts presenting claims based, upon principles of *in n* liabilities, would have had to proceed against the ssel by libel in the jurisdiction where the vessel ysically was. No claim could be enforced against ch private owner. The claimants only could obtain isfaction of their claims to the extent of the value of e vessel or to the proceeds of sale if she be sold der direction of the court. Unless claimants did so, ims would be lost for all time. If the proceeds of e of the vessel proceeded against are inadequate to all claims in full, the moneys would be distributed their priorities are determined by the practices of court administering the fund. The Government e cannot be held personally responsible. There is privity of contract.

f the *Catskill* had been privately owned, no action ld have been maintained against the barge or her ners in any court of the United States.

The ruling must follow that the District Court of ryland was without jurisdiction. Libellant's sole edy was by proceedings against the barge then

under attachment in Cuba where all claims would be marshaled and adjusted as the equities and rules of practice and priorities there determined, under penalty of the claims thereafter being barred for all time against the vessel or the Government. If cargo owners now can maintain their libels in the different district courts of the United States, the Government may be responsible for the full payment of claims aggregating $100,000, while the *Catskill* is worth less than $50,000. A construction of the act which secures such unjust results must be denied.

The principles of law and the rules of practice, basically in like cases between private parties, require liabilities asserted upon *in rem* principles, to be presented against the vessel. Such suits can only be maintained in the district where the vessel physically is.

The Government well may rest its case upon the views of Rose, D. J., dismissing this suit, thus expressed (R. p. 16):

> "There is no reason to suppose that Congress intended to make the United States sueable under any circumstances in which a suit could not have been instituted in this country, were the ship or cargo privately owned, and yet if the libellants' contention be sustained, that will be the result here. There was no privity of contract between the United States and the shippers of cargo by the Catskill, nor has the United States done them any actionable wrong. If it were an individual no proceeding

in personam could be brought against it, either in admiralty or at common law. Nor could any libel be maintained against the ship in rem in any court of the United States, because none of them could have taken possession of her. The grant of jurisdiction made by the second section of the act is expressly limited to such proceedings as could be maintained at the time of the commencement of the action herein provided for, and in the instant case at that time there was no court in the United States in which the suit could have been maintained either in rem or in personam, had an individual occupied the same relation to the cause of action as was borne by the United States.

"Nor is this a narrow construction. It is one in perfect harmony with the most liberal and far-reaching purpose which can reasonably be attributed to Congress. To hold that it intended that a citizen should be no worse off because of Government ownership, is as far as anyone will be justified in going. There is no reason to suppose that it intended to open the doors of its courts as against the United States to suits which could not there have been prosecuted against an individual or his property. The general language of every statute must be read in the light of the legislative intent in so far as that is unmistakably ex pressed."

Rogers, C. J., speaking for the United States Circuit Court of Appeals in an opinion just handed down (November 25, 1922), in the case of the

Cunard Steamship Company (Ltd.) v. *United States as owner of the S/S Isonomia*, printed in full as an appendix to this brief (p. 20), confirms Judge Rose's opinion, saying:

> We find ourselves in full accord with the doctrine laid down in the above case.

This opinion is decisive of the questions presented by this appeal.

In *Alsberg* v. *United States* (D. C. S. N. Y.) unreported (Appellant's Brief, p. 40), Mack, C. J., said:

> Judge Rose, in *Blamberg Bros.* v. *U. S.* (272 Fed. 978), has held, and in my judgment correctly, that if *at the time the proceeding is brought the vessel is not within any jurisdiction in the United States the libel is not maintainable.* The reason is not that the vessel is free from liability, but that when neither a privately owned vessel nor its owner could be sued in any court of the United States, the act should not be construed, in the absence of express provision, to subject the United States to suit under similar circumstances. (Italics ours.)

In *Phoenix Paint & Varnish Company* v. *United States*, unreported (appellant's brief, p. 45), Dickinson, D. J. (E. D. of Pa.), said:

> The basis of the exceptions taken to the libel, as we grasp the thought back of them, can be best presented by a citation of the case of *Blamberg Bros.* v. *United States* (272 Fed. Rep. 978), upon which the respondent relies.

> That case, however, is not in point. It was ruled upon the proposition that the act of Congress gave no permission to proceed unless the libel be one which could be sustained if it were against a private person or the property of a private person. The libel there could not have been so sustained, and what would follow the ergo is too obvious to require statement.

In the case of *Lucian V. Axtell, administrator of the estate of Cornelius L. Verhoef, deceased*, v. *United States*, Garvin, D. J., without discussion, held defective libel for death of seaman, because it did not allege that at the time the libel was filed the ship was found within this district, citing *Blamberg Bros.* v. *United States.*

Since the filing of the opinion of *A. Marion Smith* v. *United States*, which apparently is to the contrary, and much relied upon by the appellant (appellant's brief, p. 37), Judge Foster, of *the District Court, has granted a rehearing to the Government for the review of his ruling upon the jurisdictional questions.*

This opinion has been squarely overruled by the case of *The Cunard Steamship Co. (Ltd.)* v. *United States, supra.*

Statutes, by which the consent of the sovereign to be sued is granted, must be constructed strictly. (*Schillinger* v. *United States*, 155 U. S. 163.)

Emphasized, the admitted facts of the present case determine that the appellant can not maintain its libel under authority of the suits in admiralty act.

A discussion of the application or construction of the venue provision of section 2 of the act, upon which the appellant bases its right to maintain the libel in the district court, is unimportant. No action upon the liabilities asserted then could be prosecuted against the Government under authority of the act.

Proctors for the appellant, at the time the libel was filed, believed this construction of the act to be proper, for by article 3 of the libel (R. p. 2), the basis of the suit is:

> That the said *barge Catskill is now*, or will be, during the pendency of process hereunder, within this district and *within the jurisdiction of this honorable court.* (Italics ours.)

And by the prayer of the libel:

> Your libellant prays that * * * the said respondent be required to appear and answer all and singular the matters aforesaid according to the *principles of law and the rules and practice obtaining in like cases between private parties.* (Italics ours.)

V.

IMPORTANCE OF QUESTIONS.

The Shipping Board has sold large numbers of vessels upon the deferred payment plan (substantially bare-boat charters), receiving only a small initial payment. The purchasers-charterers have placed them in service, entered upon contracts of affreightment, incurred collision losses, and have subjected the vessels to other classes of lien claims. Later the purchasers-charterers have become hope-

lessly insolvent and lien claimants then have endeavored to impose upon the Government, through the same construction of the statute which is sought in this case, unlimited liability for such losses, which in many instances, at the time the libels are filed, greatly exceed the value of the vessels. In several instances claims aggregating several hundred thousand dollars have been presented against the Government, when, at the time the libels were filed, the vessels were only worth a few thousand dollars. This emphasizes the immediate importance of requiring libels asserting liabilities upon in rem principles, being filed in the district where the vessel charged with liability physically is.

The Government, believing its construction of the act now contended for is proper, and that in no event could its liability exceed the then value of the vessel, promptly took steps in such proceedings to surrender the vessel into the custody of the court and to have all claims against the Government, because of its ownership or possession of the vessel, heard and determined as if the vessel had originally been proceeded against. As there was no privity of contract, the Government can not be held responsible upon principles of in personam liability.

The practical result of such procedure has been to accomplish the sale of the vessel and to require all claimants having in rem claims against the vessel to present them against the proceeds of sale. If the practice is not sound the Government will be unjustly called upon to pay millions of dollars in

claims. In the same situation the private owner could not be proceeded against at all. All claimants could only proceed against the vessel, marshal their claims against the vessel, and then receive in full satisfaction of their claims their share of the proceeds of the sale of the vessel.

In this view, suits for claims existing upon in rem principles must be filed against the vessel when she is in a foreign jurisdiction, and, where the vessel physically is within the United States, must be prosecuted in the district or the jurisdiction where the vessel actually is. This suggests the necessity for requiring the libellant, where his liability is based solely upon in rem principles, to elect to have his suit proceed upon principles of liabilities in rem, as section 3 of the act specifically requires. The appellant here has not made such election.

The Government suggests the urgency of an immediate ruling by this court upon the propriety of the practice reviewed, by which it elects to surrender vessels, charged with in rem liabilities, into the custody of the court, and requiring in rem claimants to assert their liabilities against the vessels or the proceeds of their sale, under penalty of being barred from further proceeding against the Government or the vessel.

VI.

THERE HAS BEEN NO WAIVER OF JURISDICTION.

The United States, by appearing generally and answering in this suit, has not waived any jurisdictional question.

The appellant (brief, p. 28) suggests, by appearing and answering the libel, the Government has waived its right to object to the jurisdiction of the District Court. As a matter of law this can not be. A review of the litigation denies this.

The libel presents a claim for cargo damage. By article third (R. p. 2), jurisdiction was thus based:

> That said barge *Catskill* is now, or will be during the pendency of process hereunder, within this district and within the jurisdiction of this honorable court.

It did not state the barge physically was in Cuba. The United States attorney filed an answer (R. p. 4) stating the barge was in Havana. He then, by further defense, pleaded the facts determining the status of the *Catskill*, and asked that the libel be dismissed.

The libel thus asserted jurisdictional facts which suggested the right to proceed under the suits in admiralty act.

At the direction of the Attorney General, the United States attorney, leave of court being first had, then filed a suggestion of want of jurisdiction. All the facts stated therein were admitted by answer. These facts are entirely different from the averments of the libel, upon which the right to proceed by authority of the suits in admiralty act was predicated. The question of jurisdiction was then heard upon the suggestion of want of jurisdiction and the reply. The court sustained the Government's views and dismissed the libel.

With this history there can be no merit in the appellant's suggestion—the Government has not

waived any rights. Even if the libel had alleged the vessel to be in Cuba instead of the district of Maryland, as it did, as a matter of law an appearance by the United States attorney and an answer could not create or confer jurisdiction upon the district court, if the court in fact was without jurisdiction.

VII.

CONCLUSION.

The appeal must be dismissed.

Respectfully,

JAMES M. BECK,
Solicitor General.
ALBERT OTTINGER,
Assistant Attorney General.
J. FRANK STALEY,
Special Assistant to the Attorney General in Admiralty.
NORMAN B. BEECHER,
Special Counsel in Admiralty to the United States Shipping Board.

APPENDIX.

United States Circuit Court of Appeals for the Second Circuit. The Cunard Steamship Company (Ltd.), libelant-appellant, *v.* United States of America, as owner of the S. S. *Isonomia*, respondent-appellee.

Before: Rogers, Manton, and Mayer, circuit judges.

Lord, Day & Lord, for libelant-appellant.

Allen Evarts Foster, George deForest Lord, advocates.

William Hayward, United States attorney, for respondent-appellee.

Ralph B. Romaine, special assistant in admiralty to the United States attorney, advocate.

This is an appeal from a final decree entered in the United States District Court for the Southern District of New York on March 1, 1922.

The libelant is a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland. It has its principal place of business at Liverpool, England. Its principal place of business in the United States is in the city of New York.

The respondent was and is at the times hereinafter mentioned the owner of the steamship *Isonomia* which at the times hereinafter mentioned was employed by respondent as a merchant vessel.

The libel alleges that on August 30, 1920, a contract was entered into by and between Victor S. Fox & Co. (Inc.), as agents for the S. S. *Coosa*, then owned by the United States and the libelant whereby it was agreed that the said S. S. *Coosa* should be

berthed and wharfed at libelant's Pier 32, North River, at the rate of one hundred eighty-five dollars ($185) per day, while the vessel was loading or while any part of her cargo remained on the pier, together with the expense of lights, water, and telephones, and any other expenses incurred by the libelant by reason of the berthing of said vessel at said pier, all of which was to be paid by said S. S. *Coosa* to the libelant as the agreed wharfage.

It further alleges that pursuant to said agreement on September 2, 1920, cargo was deposited on said pier by Victor S. Fox & Co. (Inc.), as such agents and further cargo was so received on said pier thereafter and remained on said pier up to and including September 22, 1920.

And it alleges that on September 20, 1920, by consent of the parties to said contract, the S. S. *Isonomia*, for which vessel said Victor S. Fox & Co. (Inc.) were also agents, was substituted for the S. S. *Coosa*, and on said day S. S. *Isonomia*, then and now owned by the respondent, berthed at said pier and thereafter said cargo was laden on board her.

It then claims that by virtue of the facts alleged a lien in favor of the libelant exists against the *Isonomia* pursuant to section 30, subsection P, of the act of June 5, 1920, known as "the ship mortgage act."

And it claims that by reason of the premises stated the respondent became and is now indebted to libelant for wharfage for twenty-one (21) days at the rate of one hundred eighty-five dollars ($185.00) per day and for expenses amounting in all to the sum of $3,914 with interest thereon from September 22, 1920.

And the libel further states that libelant "elects that this libel shall proceed in accordance with the principles of libels in rem."

The United States appeared specially and without submitting to the jurisdiction of the court excepted to the libel in the following particulars:

> 1. In that it is not alleged in the libel that the S. S. *Isonomia* or its cargo at the time of the filing of the said libel was found within the Southern District of New York and within the jurisdiction of this honorable court.
>
> 2. In that the facts alleged in the said libel do not constitute a cause of action in rem in admiralty.

And it was prayed that the libel be dismissed. The court below sustained the exceptions and dismissed the libel.

ROGERS, *Circuit Judge* (after stating the above facts):

The libel claims a lien upon a ship in her home port for wharfage furnished in aid of her loading. But before considering that there is a preliminary question which must be first considered and the determination of that question may make it unnecessary to refer to any other. It appears that the libel does not allege that the vessel sought to be charged with liability was at the time of the filing of the libel found in the Southern District of New York in which the libel was filed. The respondent, therefore, insists that the District Court was without jurisdiction to entertain the suit.

The suit is predicated upon the assumption that a suit in admiralty can be maintained against the United States. If that assumption be well founded it must be because some statute has conferred the right. For no principle is better settled than that a

broad distinction exists between the existence of a right and the power to enforce it in a court of justice. And the United States like all other sovereignties can not be impleaded in a judicial tribunal except in so far as it has consented to be sued. (*Cotton* v. *United States*, 11 How. 228, 231.) This makes it necessary to inquire whether Congress has consented that the United States can be sued in admiralty, and if so, to what extent.

On March 3, 1887, Congress passed the Tucker Act, which authorized certain suits against the Government to be brought in the Court of Claims, including suits upon any contract with the Government, or for damages, liquidated or unliquidated, in cases not sounding in tort, "in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty if the United States were suable." (24 St., ch. 359, p. 505.) The district courts were given concurrent jurisdiction where the amount of the claim did not exceed $1,000. The circuit courts were given concurrent jurisdiction where the amount exceeded $1,000 and did not exceed $10,000.

On September 7, 1916, Congress passed the act creating the United States Shipping Board. Section 9 of that act provided as follows:

> Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. (U. S. Compiled Statutes, sec. 8146e, p. 8651.)

The act of 1916 came before the Supreme Court in the *Lake Monroe* (250 U. S. 246). That vessel, which was owned and operated by the United States, had collided with the *Helena* off the coast of Cape Cod, and the district court in Massachusetts, a libel having been filed against the *Lake Monroe,* issued process for the seizure of the ship. The Supreme Court held that because of the act of 1916, in spite of her ownership by the United States, the vessel was subject to the same arrest as any vessel privately owned.

The arrest and seizure of Government-owned merchant vessels was regarded as detrimental to the public interest. While it was recognized as proper that the United States should permit suits to be brought in admiralty against the Government, it was deemed wise to restore the immunity of such vessels from seizure which had been taken away by the shipping act of 1916. As respects Government vessels of war or those employed in the revenue service of the Government, they were always exempt from seizure, their immunity from arrest not having been taken away by the act of 1916. The consequence was that in 1920 Congress passed the suits in admiralty act, which provided that no vessel owned by the United States should be subject to arrest or seizure by judicial process (41 St. 525). In other words, it restored the immunity from seizure which merchant vessels owned by the Government possessed prior to the act of 1916, and it declared that a suit in personam in admiralty might be brought against the United States in a case where, if the vessel had been privately owned or operated, a proceeding in admiralty could be maintained at the time of the commencement of the action. Then the act went on to provide, as already set forth, that such suits shall

be brought in the district court "for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found."

This is the act upon which the libelant's right to maintain this suit depends, and the meaning of that act we are now called upon to determine. Section 1 of the act provides:

> That no vessel owned by the United States * * * shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions. * * *

And section 2 provides:

> That in cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States, * * * provided that such vessel is employed as a merchant vessel * * *. Such suits shall be brought in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States or in which the vessel or cargo charged with liability is found.

In interpreting the act, permitting, as it does, a suit to be brought against the United States, we must follow the rule of strict construction. This follows from the fact that the United States can not be sued without their consent, and if Congress in certain cases gives its consent, the courts are con-

fined to the letter of the statute which expresses such consent. (*Schillinger* v. *United States*, 155 U. S. 163, 166.) And all the provisions of such a statute are jurisdictional. As the liability and the remedy are created by the statute the limitations of the remedy are regarded as limitations of the right. (*The Harrisburg*, 119 U. S. 199, 214.)

Congress has the power not only to say in what kind of cases the United States may be sued but in what court the suit may be brought.

There are two kinds of suits in admiralty, one being a suit in personam, the other a suit in rem. One is a suit against a person and the other against the vessel. In many cases the libelant may sue either in rem, against the vessel, or in personam, against the owner, as he prefers. Thus in cases of collision the ship may be sued in rem, as the offending thing which caused the injury, or the libelant may elect to sue the owners in personam because of the negligence of those in charge. And similarly in cases of cargo damage the suit may be in rem, against the ship, or in personam, against the owners, either for their negligence or for breach of the contract safely to carry. And there are cases in which there may be a joinder of proceedings in rem and in personam. (See Benedict's Admiralty, 4th ed., sec. 294.) Admiralty rule 13 declares that "in all suits for mariners' wages or by material men for supplies or repairs or other necessaries, the libelant may proceed in rem against the ship and freight and/or in personam against any party liable." And rule 14 declares that "in all suits for pilotage or damage by collisions the libelant may proceed in rem against the ship and/or in personam against the master and/or the owner."

It is necessary in construing the act of 1920 to keep in mind the above principles.

These rules were promulgated on March 7, 1921, and the suits in admiralty act, as already stated, was adopted on March 9, 1920, or a year prior. However, prior to the adoption of these new rules the old admiralty rules 12 to 20 had allowed in certain cases, as was held in the *Corsair* (145 U. S. 335), a joinder of ship and freight, or ship and master, or alternative actions against ship, master, or owner alone; but in no case within those rules could ship and owner be joined in the same libel. The Supreme Court in the *Corsair* case had expressly left the question open as to whether ship and owner could be joined in the same libel in cases not falling within those rules. But other courts had expressly held in favor of joinder in such cases and in Benedict's Admiralty, section 294, that distinguished authority had declared that the advantage of such right was so obvious and the objections thereto so technical that there could be little doubt that the practice would be upheld if the question was ever presented to the highest court.

In the light of the rules of procedure referred to it seems obvious to us why Congress adopted the venue clause found in section 2 of the act of 1920. In cases in which the libelant has an alternative remedy he may avail himself of the alternative venue. The possible alternative venue relates and relates only to cases in which there is an alternative remedy. In other words if there is a liability of a vessel and a concurrent liability of the owner, the libelant may, under section 2 of the act of 1920, sue where he has his principal place of business or where he finds the vessel. As the United States may be said to be

domiciled everywhere within their territory, the rule so construed is exactly the same as between private parties in a suit against the owners of a vessel. The United States being everywhere within their territory, the libelant may sue in personam in the district where he resides and obtain jurisdiction of the respondent, or he may sue in rem where he finds the vessel without concerning himself with the whereabouts of the owner. But where there exists solely the liability of the vessel and no liability of the owner, the libelant must sue under the act of 1920, as prior to the act, only in the district in which he finds the vessel. We arrive at that conclusion as we are convinced that the purpose of the act was to place the United States on exactly the same footing as a private party. That this was the intent appears from the language of section 2 declaring "that in cases where if such vessel were privately owned or operated" a proceeding in admiralty could be maintained "at the time of the commencement of the action herein provided for" a libel in personam may be brought against the United States provided the vessel was employed as a merchant vessel, etc. We understand this to mean that where no right of action would exist between private parties none would exist against the United States. And in the instant case it is admitted that had the *Isonomia* been privately owned instead of by the United States no suit against her, on the cause of action alleged in the libel, would lie except in the district where she was found.

The general language of the provision as to venue found in section 2, as of every part of the act of 1920, must be read in the light of the legislative intent so far as that intent is clearly expressed. Read in the light of that intent we construe the pro-

The conclusion we have reached on the question discussed is supported also by *Galban Lobo & Company* v. *United States*, decided by Judge Augustus N. Hand in the Southern District of New York on June 26, 1922, and not yet reported; and by *Axtell* v. *United States*, decided by Judge Garvin in the Eastern District of New York on September 20, 1922, and not yet reported. The case of *Middleton & Company* v. *United States* (273 Fed. 199), decided by Judge Smith in the Eastern District of South Carolina, asserts a contrary doctrine. And so does the case of *Smith* v. *United States*, decided on August 4, 1922, in the Eastern District of Louisiana and not yet reported, as well as that of *Alsberg* v. *United States*, decided by Judge Mack in the Southern District of New York on September 15, 1922, which is not yet reported.

Inasmuch as in our opinion the court below was without jurisdiction to entertain the libel, the *Isonomia* not being found within the district, we find it unnecessary to consider whether the agreement upon which the libel is based was a wharfage agreement and whether all the services rendered thereunder were wharfage services or whether a lien for wharfage of a domestic vessel exists under the general maritime law or under the act of June 5, 1920.

Decree affirmed.

O

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922—No. 165.

BLAMBERG BROTHERS,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR THE APPELLANT.

Since the filing of appellant's principal brief in this case the Circuit Court of Appeals for the Second Circuit has filed an opinion in the case of *Cunard Steamship Company (Ltd.)* v. *United States.* The Government has printed a copy of the *Cunard* opinion as an appendix to its brief in the present case, and has stated that it is decisive of the questions here presented.

Also since the filing of appellant's brief in the present case the Government has filed in this Court its brief in the case of *Carver et al.* v. *United States*, which is similar in certain respects to the present case.

The *Cunard* and *Carver* cases are clearly distinguishable from the present case both on the facts and

the law, and we take the liberty of filing this reply brief for the purpose of bringing the distinction to the attention of this Court. We also desire to call attention to the inconsistent and conflicting positions taken by the Government in the various pending cases involving the construction of the suits in Admiralty Act; and to reply briefly to certain arguments made in the Government's brief in the present case which were not suggested in the Court below.

POINT I.

The *Cunard* decision and the *Carver* case are distinguishable from the present case because there the records did not disclose where the vessel was or even that she existed at the time or after suit was begun, or otherwise show that the libellants "could have maintained a proceeding in admiralty" anywhere.

Counsel for the United States cite in their brief the opinion delivered by the Circuit Court of Appeals for the Second Circuit, in the case of *Cunard Steamship Company* v. *United States* (Appellee's Brief, Appendix) on November 24, 1922, eleven days after our brief in this case was filed. It may be noted at the outset that the *Cunard* decision was rendered by the same Court which has certified to this Court the same question in the *Carver* case, which will be argued immediately after the case at bar. Apart from this point, however, the *Cunard* case is distinguishable from the present both on the facts and the law. Neither the record nor the opinion discloses where the United States owned vessel involved was at the time that suit was commenced. It does not even appear that the vessel there involved was

in existence at the time the action was begun. Nor is any other fact disclosed showing that the libellant at the time it commenced its action "could have maintained a proceeding in admiralty" anywhere. All discussion of other points was clearly *obiter dicta*. In that respect the *Cunard* case is identical with the *Carver* case. A further distinction from the *Carver* case is that in that case there was no election to proceed in accordance with the principles of libels *in rem*. Counsel for the United States apparently agree that the *Cunard* case is distinguishable from the present on the law, as they ignore in their argument here the reasoning of the Court in that case. The Court in the *Cunard* case assumed and, because of the exigency created by the theory it was developing, held that the Suits in Admiralty Act not merely created a remedy against the United States *in personam* as a substitute for a remedy under Section 9 of the Shipping Act of 1916 against the United States owned vessel *in rem*, but also created an independent liability or substantive right against the United States *in personam*, and in addition created an independent remedy to enforce that liability *in personam*. The Court then held, based on these assumptions, that Congress expressed in the act an intention that a libellant pursuing his substitute remedy *in personam* on the liability *in rem* should not have the privilege expressly granted all libellants in the second sentence of Section 2 of the Act of suing in any of the three districts specified. Counsel for the United States deny in their brief in this case the first fact or conclusion assumed by the Court in the *Cunard* case. On page 8 of their brief counsel say: "The scope of the jurisdiction provided by the Act has been seriously questioned. The legislative history indicates that it must be measured by and limited to the liabilities considered by Section 9 of the original Shipping

Act." Section 9 (quoted on p. 7 of Appellee's Brief and on p. 21 of Appellant's Brief) clearly shows an intention not to create a liability of the United States *in personam*. Counsel in thus interpreting the Suits in Admiralty Act follow Judge Thompson's declaration in *The Kittegaun*, 266 Fed. 897, 899 (E. D. Pa., July 1920), that:

> "The apparent purpose of Sections 1 and 2 of the Act is to prevent interference through arrest and seizure with vessels and cargoes while the vessels are being operated or the cargoes are in course of transportation, and to substitute for an action *in rem* against the vessel or cargo an action *in personam*."

POINT II.

The various interpretations placed upon the Suits in Admiralty Act by counsel for the Government are inconsistent with each other and are all contrary to the weight of judicial authority.

The Government's Interpretation in the Present Case.

In the present case counsel for the United States argue (Appellee's Brief, p. 8) that the Act recognizes no liability other than that created against the vessel by Section 9 of the Shipping Act of 1916; and contend that even such liability is recognized only so far as it is enforceable within the territorial limits of the United States. Under this interpretation the Suits in Admiralty Act merely substitutes a remedy *in personam* for such of the remedies *in rem* as are immediately enforceable in the selected district of this country at the particular moment the suit *in personam* is begun.

The Government's Interpretation in the Carver Case.

In the *Carver* case, in which the record does not disclose where the vessel was, or even that she was in existence, at the time when or after the action was commenced, or otherwise show that the libellant could have maintained a proceeding in admiralty anywhere, counsel for the United States deny that the Suits in Admiralty Act recognizes any liability created by Section 9 of the Shipping Act of 1916. They contend that Section 9 was repealed absolutely and that no substitute was created by the Suits in Admiralty Act excepting in cases where a private owner would be personally responsible.

The Interpretation by the Circuit Court of Appeals, Apparently at the Government's Suggestion, in the Cunard Case.

In the *Cunard* case (Appendix, Appellee's Brief) the Circuit Court of Appeals gives to the Suits in Admiralty Act a third and radically different interpretation. This interpretation is that the Suits in Admiralty Act not merely substitutes a remedy *in personam* for a remedy *in rem* founded on a liability of the vessel, but also creates a liability of the United States *in personam* and a remedy *in personam* on that liability. Reasoning from this assumption, the Court concludes that the second sentence of Section 2 of the Suits in Admiralty Act, relating to venue, does not mean what the language would naturally import, but means that a libellant suing on a liability of the vessel *in rem* may sue only in a district where the vessel is found. That this is a strained construction of the Act is evident on considering the fact that, if it had so intended, Congress could easily

have provided that a libellant pursuing a remedy *in personam* on a liability of the vessel *in rem* should have the right to sue only in the district where the vessel is found. Instead, it clearly formulated in the second sentence of Section 2, an alternative venue rule applicable to all libellants qualifying with a substantive right under the first sentence of that section.

It is significant that nowhere in their briefs in this or the *Carver* case (except by merely printing the opinion as an Appendix) do counsel for the United States adopt, or recognize as sound to any extent, the interpretation or reasoning of the Court in the *Cunard* case.

The Appellant's Interpretation of the Suits in Admiralty Act.

The interpretation of the Suits in Admiralty Act for which this appellant contends is clearly and concisely stated by Judge Foster in *Smith* v. *United States* (Appellant's Brief, Appendix A, p. 37):

> "The Act of March 9, 1920, contains no restriction in terms such as imposed by the decision in *Blamberg Bros.* v. *U. S., supra.* In fact, considering the provision of Section 7, Congress seems to take the position that a vessel owned by the United States Shipping Board cannot be seized *in rem* in any country."

All three of the interpretations placed on the Act by the Government, and by the Circuit Court of Appeals for the Second Circuit in the *Cunard* case, differ from the simple and natural interpretation given to the Act by Judge Foster in the *Smith* case. The decision of the Circuit Court of Appeals overruling the decision of Judge Learned Hand in the *Cunard* case is necessarily con-

trary to the decision of Circuit Judge Mack in the case of *Alsberg* v. *United States* (Appellant's Brief, Appendix B, p. 40), and to the decision of Judge Dickinson in *Phoenix Paint Co.* v. *United States* (Appellant's Brief, Appendix C, p. 43). It is also contrary to the decision of Judge Smith in *Middleton* v. *United States*, 273 Fed. Rep. 199, where there was an election to sue in accordance with the principles of libels *in rem*, and jurisdiction was sustained although the vessel was not within the district. The decision in the *Cunard* case is contrary also to the decision of Circuit Judge Mayer in the *Carver* case, and to the interpretation of the Act by Judge Thompson in the *Kittegaun* case hereinbefore quoted (*supra*, p. 4).

The decision in the *Cunard* case is in accord with the decision of Judge Learned Hand in the case of *Agros Corporation* v. *United States* (unreported, opinion annexed hereto as Appendix A), but both of these decisions are directly contrary to the Government's argument in the case at bar.

In view of the foregoing discussion of the District Court decisions in the various Circuits, we submit that the contention of the Government in the present case is unsupported by any authority excepting the decision of Judge Rose from which this appeal is taken; and that the decision of Judge Foster in the *Smith* case is based not only upon sound reasoning but is supported by the weight of actual decisions, as distinguished from mere dicta.

POINT III.

The words "in the United States or its possessions" in Section 1 of the Suits in Admiralty Act do not limit the jurisdiction of United States courts to afford the remedy provided by Section 2 of the Act.

The words "in the United States or its possessions" merely express a limitation in the first section of the Act which would necessarily be implied even in the absence of such words. A prohibition against the seizure of vessels of the United States obviously could have no extra territorial effect. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347. The United States could properly endeavor to obtain immunity for United States-owned vessels in foreign countries, not through legislative fiat by Congress but only by diplomatic request or representation through the State Department. In other words, Section 1 of the Suits in Admiralty Act merely recognizes the inability of Congress to legislate or impose the sovereign will of the United States on foreign territory. This is confirmed by the language of Section 7 of the Act. Section 7 shows (as stated in *Smith* v. *United States*, Appellant's Brief, Appendix A), the intent of Congress that the vessels be immune, even though in foreign countries, and contains, as an effort to satisfy that desire, a conjunctive authorization or direction to the Secretary of State to "direct the United States Consul * * * to claim such vessel or cargo as immune from such arrest * * * *and* to execute an agreement, undertaking, bond or stipulation for and on behalf of the United States * * * for the release of such vessel."

It is a very significant circumstance that neither

the Circuit Court of Appeals in the *Cunard* case nor the Government in its briefs in this case or the *Carver* case, makes any reference to the provision in Section 7 of the Suits in Admiralty Act for contesting the jurisdiction of foreign courts; or makes any attempt to explain away the obvious intent of that section to prevent the seizure of United States vessels in foreign ports and concentrate the litigation against such vessels in the Courts of the United States.

POINT IV.

The appellant has clearly elected to have this case proceed upon the principles of libels *in rem*.

The Government has stated in its brief in the present case that there was no election by the libellant to have this case proceed upon the principles of libels *in rem*. We submit, however, that there is no substance in this contention in view of the facts stated in Point III of appellant's principal brief. Not only do counsel for the Government not dispute these facts but, on the contrary, after reciting the various steps taken in the litigation, including the filing of the Suggestion of Want of Jurisdiction and the Reply thereto, say in their brief (Appellee's Brief, p. 8):

> "The question of jurisdiction was then heard upon the suggestion of want of jurisdiction and the reply."

In this connection we quote as follows from the decision of this Court in the case of *The Syracuse*, 12 Wallace 167, at page 173:

> "It is objected that the libel does not specifically charge this antecedent negligence as a

fault. This is true, and the libel is defective on that account, but in admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libellant, if the Court can see there was no design on his part in omitting to state them. There is no doctrine of mere technical variance in the admiralty, and subject to the rule above stated, it is the duty of the Court to extract the real case from the whole record, and decide accordingly."

POINT V.

The construction of the act contended for by the appellant in this case will not subject the Government to any inconvenience or expose it to unlimited liability.

It is contended by counsel for the Government in this case and the *Carver* case that if jurisdiction is sustained the United States will be liable in excess of the value of the vessel and her pending freight. This argument is apparently based upon the mistaken assumption that, to obtain the benefit of the Limitation of Liability Act of 1851, the United States must surrender the vessel. This assumption is clearly erroneous, as the Admiralty Rules of this Court specifically provide that the owner of a vessel, in order to obtain a limitation of his liability, need only assign *his interest* in the vessel to a trustee; or pay into Court, or give security for, the appraised value of his interest in such vessel. Such proceedings need not be taken in the district where the vessel is, but may be taken "in the District Court for any district in which the said owner or owners may be sued in that behalf."

Upon giving the proper security or transferring his interest in the vessel to a trustee, the owner is entitled to an injunction restraining the beginning or prosecution of any other suits or proceedings against him. Supreme Court Admiralty Rules 51 and 54.

Counsel for the Government, in the *Carver* case, refer to the uncertainty as to the value or interest which must be surrendered, and emphasize the great decline in the value of vessels during the last year or two. These are considerations, however, which apply with equal force in all proceedings for limitation of liability, whether between private parties or in suits against the Government. If an owner, in order to obtain a limitation of his liability, must surrender the value of the vessel as of a date when she had a far greater value than at the time the surrender is made, this result, if deemed inequitable, must be corrected by amendment of the Limitation Act of 1851. We submit, however, that, for two reasons, there is no injustice in the present rule. In the first place the value of the vessel may just as well increase after the disaster, in which event the owner has the benefit of surrendering the lower value. In the second place, the owner actually receives, at the end of the voyage, the precise value which he is later called upon to surrender; and it is for him to determine whether he will retain this value in the form of a vessel or convert it into cash for the purpose of meeting liabilities which may later be asserted.

CONCLUSION.

It is respectfully submitted that, as the District Court had jurisdiction, its decree should be reversed with costs.

December 4, 1922.

D. ROGER ENGLAR,
T. CATESBY JONES,
JAMES W. RYAN,
J. EDWARD TYLER, JR.,
Counsel for Appellant.

Appendix A.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A 84-176.

THE AGROS CORPORATION

—against—

UNITED STATES OF AMERICA.

Sur respondent's exceptions to a libel in the admiralty.

The case raises only one question: Whether under the Act of March 9, 1920, a libellant may sue the United States *in personam* upon a maritime claim which would be cognizable by an admiralty court between private persons; or whether that Act is limited to suits *in rem*. The question arises upon exceptions to interrogatories annexed to the libel and designated to draw out the relation of the United States to the vessel, *i. e.*, whether there was a personal obligation of the United States from her failure to perform a contract of carriage.

HORACE S. GRAY for the exceptions.

RUSSEL T. MOUNT opposed.

LEARNED HAND, *D. J.*: I think that it is impossible to read the Suits in Admiralty Act (March 9, 1920) without concluding that Congress intended to provide for suits which are in the nature of *in personam* as well as *in rem*. In the first place, although the statute is drawn by persons entirely familiar with the usages and terms of the Admiralty Section 2, which confers the

right, speaks, not of a libel *in rem,* which as the natural phrase if the respondent be right, but of "a proceeding in admiralty." Whenever such a proceeding "could be maintained" if the "vessel were privately owned or operated," "a libel *in personam* may be brought." The statute appears, therefore, to speak *sub specie generals.* The history of the Act strongly corroborates this conclusion, as will appear in a moment.

Furthermore, even if Section 1, which enacts that the remedy *in personam* is to be a substitute for the right given by the Act of 1916 to arrest United States ships, raises a doubt upon this interpretation, the later sections lay it. Thus, in Section 3 the libellant may elect to proceed with his libel as *in rem*, if there be a lien, though of course without arrest. What can such an election be, if he have only that right? This is not even left to implication, because his election is not to deprive him "from seeking relief *in personam* in the same suit." "*In personam*" does not refer to the form of the libel, since that must be "*in personam*" anyway, all arrests being forbidden. It seems hardly necessary to argue that it refers to relief which could be given *in personam* against a private person, and thus necessarily presupposes that such relief is open to any libellant in a proper case.

Finally, Section 6 grants the same "exemptions" and "limitations of liability" to the United States as to private owners. Allowing that "exemptions" is an indefinite word, "limitations of liability" can scarcely mean anything but the limitation which has been given to ship owners for seventy years. It applies necessarily to rights *in personam,* and, since the Act is technically drafted, would have been quite meaningless unless suits *in personam* had been understood to be included.

The respondent's argument is plausible, based upon the main purpose of the Act, *i. e.,* to create a substi-

tute for the earlier right of arrest, and this is reinforced by the reports of the legislative committees. However, there appears to me a conclusive answer to any such argument in the history of the Act in Congress. The original draft of Section 2 read as follows: "The United States * * * may be sued *in personam* * * * in those cases where, if the United States were suable as a private party, a suit *in personam* could be maintained, or where, if a vessel or cargo were privately owned and possessed, a libel *in rem* could be maintained and the vessel or cargo could be arrested or attached at the commencement of the suit."

Thus it appears that the final form of Section 2, *i. e.*, "a proceeding in admiralty," was a substitute for an express grant of jurisdiction as well over suits *in personam* as over suits *in rem*. Now it seems to me flatly impossible to suppose that when Congress made the change from the enumeration of these two kinds of suits to a general phrase fitted to include both, it intended to cover only one of the two enumerated. Having shown its prior purpose specifically to include both, and having finally selected less cumbersome language naturally including both, how can it be argued that it meant to cover only one which it had shown that it knew how to express accurately when it chose?

While the case is of first impression, so far as any judicial intimations have gone, they are in accord (*Middletown & Co.* v. *U. S.*, 273 Fed. R. 199, 200, 201; *Blamberg Bros.* v. *U. S.*, 272 Fed. R. 978, 979).

The exceptions to the interrogatories are overruled; the other exceptions were disposed of at the argument.

October 11, 1922.

LEARNED HAND,
D. J.

BLAMBERG BROTHERS *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

No. 165. Argued December 5, 1922.—Decided January 2, 1923.

The second section of the Suits in Admiralty Act does not authorize a suit *in personam* against the United States, as a substitute for a libel *in rem*, when the United States vessel is not in a port of the United States or of one of her possessions. P. 458.

272 Fed. 978, affirmed.

APPEAL from a decree of the District Court dismissing a libel in admiralty for want of jurisdiction.

Mr. D. Roger Englar, with whom *Mr. James W. Ryan*, *Mr. J. Edward Tyler, Jr.*, *and Mr. T. Catesby Jones* were on the briefs, for appellant.

The remedy afforded by § 2 of the Act of March 9, 1920, is not limited to cases where, if the vessel were privately owned, a proceeding in admiralty could have been maintained within the territorial limits of the United States, but is available generally to all persons who could have maintained proceedings in admiralty against vessels of the United States anywhere in the world prior to the passage of this act. *Smith* v. *United States* (unreported, Dist. Court, Eastern Dist. Louisiana, August 4, 1922); *Phoenix Paint & Varnish Co.* v. *United States* (unreported, Dist. Court, Eastern Dist. Pennsylvania, November 17, 1921).

This conclusion is supported by the fact that, if the substitute remedy were not available so long as the vessel remained outside the United States, § 5 of the act would deprive the libelant of any remedy in cases like the present, where the vessel did not return within the time provided for suit.

The argument of the Government and the decision of the judge below proceed on the assumption that the United States desired to force its citizens to sue its vessels in the courts of foreign countries wherever this remedy was available to them, although opening its own courts to such suits where jurisdiction could be had only in those courts. As might be expected, this view finds no support in the language of the act. On the contrary, § 7 indicates an intent by Congress to prevent, as far as lay in its power, the seizure of vessels of the United States in foreign countries as well as in the United States; and to concentrate all such litigation in its own courts.

Moreover, the United States would thus avoid incurring the expense of furnishing surety bonds, and of retaining counsel to defend it in litigation in foreign countries.

Congress clearly intended to substitute the personal credit of the United States for the security of the particular vessel. In the present case the libelant had a right to arrest the "Catskill" as security for its claim. Having that right, it was within the class of vessel-creditors entitled to sue the United States *in personam*.

Section 8 of the act, providing that decrees in suits under the act shall be payable "out of any money in the Treasury of the United States not otherwise appropriated," is substantially a pledge by the United States of those unappropriated moneys in the Treasury as a fund or stipulation to meet the liabilities incurred by the Shipping Board's vessels. This general pledge or stipulation was apparently intended as a substitute for multitudinous stipulations to release individual vessels from arrest. It was intended to be available to everyone who previously had a right to have a United States vessel arrested as security.

If Congress intended to prevent vessels from being delayed because of arrest under legal process, the theory of the lower court that the libelant in the present case should have arrested the vessel in Cuba would, by encouraging delay to the vessel, violate the intention of Congress.

Congress intended to grant a right to sue the United States *in personam* to everyone who had a cause of action against the vessel under § 9 of the Shipping Act of 1916. This would be so even if the libelant had no present ability to arrest the vessel, provided it had a right or cause of action against her.

Sections 1 and 7 of the Suits in Admiralty Act repeal the remedy provided by § 9 of the Shipping Act of 1916. The first sentence of § 2 of the Suits in Admiralty Act

defines that part of § 9 of the Shipping Act of 1916 which is not repealed. In other words, the first sentence of § 2 of the Suits in Admiralty Act deals only with causes of action, substantive rights or liabilities. The second sentence deals only with venue. Therefore, the phrase in the first sentence, if "a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for," requires only that the cause of action or substantive right be of an admiralty nature, and was merely intended to exclude common-law causes of action on which the vessel might be arrested under foreign attachment.

The first sentence does not require that the libelant be able to arrest the vessel at the time he files his libel. It merely requires that he have an admiralty cause of action enforceable, if the vessel were privately owned, on her coming within the court's territorial jurisdiction. Congress eliminated from the original bill a proposed requirement in the first sentence that the substitute remedy should be available only if, in addition to there being an admiralty cause of action, "the vessel or cargo could be arrested or attached at the time of the commencement of suit." As finally passed, the act merely requires the libelant to show that his cause of action or substantive right is one such as District Courts "ordinarily have cognizance" of "in their admiralty and maritime jurisdictions."

The United States, by appearing generally and answering in this suit, there having been at the time the suit was commenced jurisdiction of the person or vessel at Havana, waived any requirement as to venue or jurisdiction of the person. *United States* v. *Hvoslef*, 237 U. S. 1, 11. A suit in Havana against a vessel owned by the United States would be a suit against the United States. *The Western Maid*, 257 U. S. 491.

It was unnecessary for the libelant to elect whether to proceed *in personam* or *in rem;* but the libelant did in

fact elect to proceed in accordance with the principles of libels *in rem*.

Mr. Solicitor General Beck, with whom *Mr. Assistant Attorney General Ottinger*, *Mr. J. Frank Staley*, Special Assistant to the Attorney General, and *Mr. Norman B. Beecher* were on the brief, for the United States.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is an appeal from the District Court of Maryland on a question of jurisdiction duly certified by the District Judge.

The appellant, a corporation of Maryland, February 26, 1921, filed a libel *in personam* against the United States under the Suits in Admiralty Act, approved March 9, 1920, c. 95, 41 Stat. 525. The libel alleged that on October 6, 1920, the libelant had shipped 1500 bags of corn from Baltimore to Havana, Cuba, to its own order, upon the barge "Catskill," that the corn had never been delivered in accordance with the terms of the bills of lading, and that due to the delay the corn had greatly deteriorated in value, whereby libelant had been damaged in the sum of $15,000. The libel contained this averment, "Third. That said barge 'Catskill' is now, or will be, during the pendency of process hereunder, within this District and within the jurisdiction of this Honorable Court."

The United States made answer April 22, 1921, through the district attorney. It admitted that it was the qualified owner of the "Catskill," but denied that it was or had ever been, in charge of the operation of the barge. It alleged that it entered into a contract for the sale of the barge July 26, 1920, for sixty thousand dollars, six thousand dollars in cash and the balance in monthly instalments of three thousand dollars, that the vendee had defaulted in all the monthly payments, that the

barge was delivered to the vendee June 30, 1920, and the United States had no control over her management or operation, and did not make the contract of affreightment described in the libel. In answer to the third paragraph of the libel the respondent alleged that it was advised that the barge was in Havana and had no knowledge when it would arrive in the jurisdiction of the court. On May 3, 1921, having obtained leave of court, the United States as respondent filed a suggestion of want of jurisdiction in which it averred positively that the barge was then in the port of Havana, Cuba, where it had been libeled in the sum of $3,725 for wage claims. It further averred that libels *in personam* had been filed against it in three other district courts of the United States for claims aggregating a sum in excess of the value of the barge which was alleged not to exceed $50,000. The suggestion concludes that the respondent can not be proceeded against by a libel *in personam*, or by a libel in the nature of an *in rem* proceeding as provided for by the Suits in Admiralty Act, for the reason that at the time of filing the libel, and at all times thereafter, the barge "Catskill" was and had been at the port of Havana, Cuba, and without the jurisdiction of the court. The libelant, answering the suggestion, alleged that, although under the facts as alleged, no direct personal liability arose against the respondent under the general law, yet under the Suits in Admiralty Act, a right to bring a libel *in personam* was created as a substitute for an ordinary libel *in rem* and that the presence of the barge in the jurisdiction of the court was not essential to such jurisdiction *in personam*.

The first section of the Suits in Admiralty Act provides that no vessel or cargo owned by the United States "shall hereafter, in view of the provision herein made for a libel in personam; be subject to arrest or seizure by judicial process in the United States or its possessions."

The second section provides that in cases where, if such vessel were privately owned, a proceeding in admiralty could be maintained, a libel *in personam* may be brought against the United States, provided the vessel is employed as a merchant vessel or a tugboat. The suits are to be brought in the United States District Court where the libelants live or have their principal place of business in the United States, or in which the vessel or cargo charged with liability may be found. Provision is made for manner of service and, upon application of either party, for the transfer of such libels to any other district in the discretion of the court.

By the seventh section of the act, if any vessel or cargo of the United States is seized by process of a court of any country other than the United States, the Secretary of State of the United States in his discretion, upon request of the Attorney General, may direct the United States consul residing near the port of seizure to claim immunity from such suit and seizure and to execute a bond on behalf of the United States as the court may require for the release of the vessel or cargo.

The District Court on the facts stated held that it was without jurisdiction under this statute to entertain a libel *in personam* against the United States. We agree with that holding. The first section of the act is limited in its inhibition of seizures of vessels and cargoes of the United States to ports of the United States and its possessions. The second section is *in pari materia*, and the same limitation must be implied in its construction. This act was passed to avoid the embarrassment to which the Government found itself subjected by the Act of September 7, 1916, c. 451, 39 Stat. 728, by the ninth section of which vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of maritime liens. *The Lake Monroe*, 250 U. S.

246. It was intended to substitute this proceeding *in personam*, as the first section of the act expressly indicates, in lieu of the previous unlimited right of claimants to libel such vessels *in rem* in the ports of the United States and its possessions. Congress had no power, however, to enact immunity from seizure in respect of such vessels when in foreign ports, and therefore the embarrassment of seizures was to be mitigated in another way, *i. e.*, by claiming immunity on international grounds and, if that failed, by stipulation or bond in the name of the United States. The provisions of the seventh section confirm the construction by which provisions of the second section are limited in their application to vessels within the jurisdiction of the United States.

A number of important questions as to the construction of this statute have arisen in other cases, and the argument before us has taken a wide range. Those questions do not require decision here, and we do not decide them. All we hold here is that the District Court was right in construing the second section of the Suits in Admiralty Act not to authorize a suit *in personam* against the United States as a substitute for a libel *in rem* when the United States vessel is not in a port of the United States or of one of her possessions.

Affirmed.